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THE LAW OF ARBITRATION IN SCOTLAND.

THE LAW OF ARBITRATION IN SCOTLAND.

BY

JOHN PHILP WOOD, LL.D.,
WRITER TO THE SIGNET,

AND

J. R. N. MACPHAIL,
ADVOCATE.

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PREFACE.

THIS volume is an attempt to state, in as succinct a form as is consistent with accuracy, the law of Scotland with regard to Arbitration. At various places in the text will be found Styles of the writings commonly employed in connection with Arbitrations. Every effort has been made to bring these Styles up to date, and it is hoped that the combination in one book of principles and practice may be of service to the profession. Free use has been made of the law of England for the purposes of illustration and of contrast.

The important class of Arbitrations under the Lands Clauses Act has received separate treatment, with annotations of the English statute and case law on the same subject.

A list has also been given of other modern Statutes which contain special provisions as to Arbitration.

The Index and Table of Cases have been prepared by Mr. JOHN LAMB SMITH, S.S.C., who has also afforded further assistance of great value.

EDINBURGH, *October* 1900.

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THE

LAW OF ARBITRATION IN SCOTLAND.

CHAPTER I.

THE CONTRACT.

SUBMISSION or Arbitration is defined by Erskine[1] as a contract entered into between two or more parties who have debateable rights or claims against one another, by which they refer their differences to the final determination of an arbiter or arbiters, and oblige themselves to acquiesce in the decision.

In Scotland the words "submission" and "arbitration" are synonymous.

In England "submission" means the deed, "arbitration" the contract and the procedure consequent thereon. By the 27th section of the Arbitration Act, 1889,[2] which applies to England only, "submission" is defined as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."[3]

It has always been held in Scotland that a submission implies a contract, and therefore that it is irrevocable except by consent of the whole parties thereto.[4]

A contrary view obtained in England, where it was held that a submission was merely a mandate to the arbiter from the parties

[1] iv. 3, 29.

[2] 52 and 53 Vict. c. 49.

[3] In the case of Baker *v.* Yorkshire Fire and Life Assurance Co. [1892], 1 Q.B. 144, a fire insurance policy was held to be a "submission" in the sense of the statute, although not signed by the party insured.

[4] See Bell, p. 28.

to the submission, and therefore revocable at the pleasure of any one of them, unless the submission had been made a Rule of Court.[1]

The present English law, however, is that "a submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an Order of Court."[2]

The Form of the Contract.

No special form of words is necessary by the law of Scotland to constitute the contract of arbitration. A valid submission, for example, is made if two parties sign a writing in the following terms: "We, A. and B., hereby appoint C. and D. to be arbiters to settle the following question between us (here specify the matter in dispute).—In witness whereof."

In the Juridical Styles[3] there is given the Style of a general submission. The words used are, "hereby submit and refer all demands, claims, disputes, questions, and differences, heritable or moveable, real or personal, depending and subsisting between us upon any account, cause, or transaction whatever." As the words "submit" and "refer" mean the same thing, one of them may safely be omitted. It would also be enough to say, as regards what is submitted, "all questions between us."

The Style goes on to speak of the "amicable decision, final sentence, and decree-arbitral." These three expressions are also synonymous. In place of them it would be sufficient to use the single word "award."[4]

[1] But an agreement to refer to an arbiter to be afterwards agreed on was not a complete submission, and could not be revoked,—see Russell, p. 50.

[2] Arbitration Act, 1889, sec. 1. The prior enactments are repealed by the second schedule. A form of revocation of a submission will be found in 1 Key and Elphinstone, p. 165.

[3] Moveable Rights, p. 223.

[4] There is the high authority of Lord Deas in the case of the Earl of Hopetoun *v.* The Scots Mines Co., 18 D. 739, for saying that the expressions "decree-arbitral" and "award" are synonymous. A form of general sub-

The remaining clauses of this Style will now be considered in their order, as the simplest and perhaps the best way of dealing with the subject.

The Oversman.[1]

It is not usual to name an oversman in the submission itself. And it is no longer necessary to specially empower the arbiters to name an oversman. The Arbitration (Scotland) Act, 1894,[2] enacts that, "unless the agreement to refer shall otherwise provide, arbiters shall have power to name an oversman, on whom the reference shall be devolved in the event of their differing in opinion."

The former law was that arbiters in an ordinary submission had no implied power to choose an oversman either at the commencement of the arbitration or after they had differed in opinion.[3] So far was this idea carried, that even where a reference in a mineral lease was "to persons of skill to be chosen mutually by the parties," it was held that this meant merely the nomination of one man of skill on each side, and did not empower the persons so chosen to nominate an oversman.[4]

It has always been otherwise in a submission under the Lands Clauses Act. There the arbiters have by statute express power to appoint an oversman. Indeed it is essential that they make the appointment before they enter on the work of the submission. If they fail to do so, the Lord Ordinary on the Bills, on the application of either party to the submission, will name an oversman.[5]

It is desirable that in every arbitration the arbiters should choose their oversman at the commencement of the proceedings, for when they have begun to differ in opinion, they are as likely to fall out about the selection of an oversman as about any other thing.

mission is given thus shortly in 1 Key and Elphinstone, p. 159: "We, A. of, &c., and B. of, &c., do hereby refer all matters in dispute between us to the award and determination of K. of, &c.—In witness," &c.

[1] See also *post.* p. 32.

[2] 57 and 58 Vict. c. 13, sec. 4.

[3] Matheson *v.* M'Kenzie, 4 D. 1472.

[4] Cochrane *v.* Guthrie, 23 D. 865.

[5] See *post.* pp. 33, 94, 97, and 98.

The ordinary practice is for the oversman elect to hear the proof and to listen to the arguments of parties, sitting along with the arbiters. In appearance indeed the oversman sits as the president of the tribunal. To this practice it has been objected that the oversman could not be said to have heard parties, because "he was not at the time clothed with the technical office of oversman." This objection was, however, repelled.[1] In a reference *in re mercatoria* the award by the oversman was held to be in order although he had not heard the parties, in respect that the procedure in the arbitration had been in accordance with the custom of the place.[2]

Power to receive Claims, &c.

The Style expressly confers power on the arbiters to receive claims, to take proof themselves or by a commissioner, and to make remits to men of skill. This seems unnecessary, except perhaps with regard to delegating the taking of proof, for arbiters must receive the claims of parties and (subject to an exception to be hereafter noted) are entitled to hear evidence, and especially argument reasonably and timeously tendered to them.[3] They are also entitled to consult counsel, and in the case of accounting to employ professional accountants.[4]

But if in an extensive submission it is desired that the arbiters shall be authorised to employ men of skill, it is expedient specially to confer this power.

Powers to decern and award Expenses.

The Style confers power on the arbiters to decern against either party for the sum which may be found due. It is advisable (where it is appropriate to do so) to give an express power so to decern; that is, not only to pronounce certain findings, but to give decree,

[1] Crawford *v.* Paterson, 20 D. 488.
[2] Hope *v.* Crookston, 17 R. 868.
[3] *Post.* pp. 43 and 44.
[4] M'Leod *v.* Bisset, 4 S. 330; Caledonian Railway Co. *v.* Lockhart, 19 D. 527, 3 Macq. 808.

which the successful party can enforce against the unsuccessful.[1] The Style, it may be noted, does not contain a clause giving power to assess damages. If it be desired that the arbiters should have this power, it must be given expressly.[2]

The Style also gives power to the arbiters to find expenses due by the one party to the other. This is unnecessary, for it has long been settled law in Scotland that arbiters have an inherent power to award expenses to either party, even where the submission is silent on the point.[3]

Until recently an arbiter in England had not this implied power to award expenses. Power to deal with expenses has, however, been conferred upon arbiters in England by the Arbitration Act, 1889. "The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid, or any part thereof, and may award costs to be paid as between solicitor and client."[4]

It is competent for an arbiter, when awarding expenses, to give decree therefor directly to the agent of the successful party.[5]

The Style treats of the remuneration to the clerk to the submission, to a commissioner who may be appointed to take evidence, and to men of skill who may be employed by the arbiters. It also refers to the expense of the deed of submission, and of the award to be pronounced in the reference. The arbiters, however, have power to deal with these matters without special mention of them in the deed of submission.[6]

[1] Aberdeen Railway Co. *v.* Blaikies, 1 Macq. 461.

[2] *Post.* p. 12.

[3] Robertson *v.* Brown, 15 S. 199; Ferrier *v.* Alison, 5 D. 456, 4 Bell's App. 161; Laidlaws *v.* Robertson, 6 S.L.R. 587.

[4] Schedule I., clause 2.

[5] Hood *v.* Baillie, 11 S. 207. In this case the submission expressly gave power to the arbiter to award expenses. There is, however, no reason to doubt that an arbiter has power to decern for expenses in name of the agent, even when the submission is silent on the point, and the arbiter's power over expenses rests merely on the common law.

[6] Macfarlane *v.* Black, 4 D. 1459. This case relates to the clerk's account in an abortive submission.

Remuneration of Arbiters.

The Style confers no power on the arbiters or oversman to find remuneration due to themselves, and to fix the amount thereof. If it is intended that they should have this power, it must be expressly conferred upon them. At common law, and in the absence of express stipulation, an arbiter has as a rule no legal claim to a fee, for in theory an arbiter is regarded as a private judge, and is presumed in the ordinary case to act gratuitously.[1]

In the case of Duff,[2] observations were made from the Bench as to the impropriety of an arbiter who had accepted a gratuitous reference demanding a fee before he would deliver his award.

It is otherwise in England. There an arbiter may name his own charge, for he is not presumed to act gratuitously. But he should not mention his remuneration in the award unless the submission empowers him to do so.

Even in England, however, an arbiter cannot recover his charges by an action unless the parties have expressly undertaken to pay him. But he has a lien on the submission and the award, and it is the usual practice for the arbiter to intimate his charges and to refuse to deliver the award or tell its terms till his charges are paid.[3]

There are, however, certain exceptions to the general rule of the law of Scotland that in the absence of stipulation an arbiter is not entitled to remuneration. For instance, a judicial referee is entitled to remuneration,[4] so also is an arbiter acting in a statutory arbitration under the Lands Clauses Acts.[5]

In certain circumstances, also, an ordinary arbiter may be

[1] Kennedy *v.* Kennedy, F.C. 20th Jan. 1819; Henderson *v.* Paul, 5 M. 628.

[2] Duff *v.* Pirie, 21 R. 80.

[3] Russell, pp. 176 and 285.

[4] Baxter *v.* Macarthur, 16 S. 1085. A judicial reference is an arbitration entered into by the parties to a case in Court, at the sight of and with the sanction of the Court. The differences between a judicial reference and an ordinary submission are explained *post.* p. 74.

[5] Murray *v.* North British Railway Co., 2 F. 460.

found entitled to demand remuneration when the facts are held by the Court to imply a contract that his services should be paid for.[1]

In practice, however, such an understanding or implied contract ought not to be trusted to, and every submission should provide for remuneration to the arbiters and oversman, or to the arbiter when the reference is to a single arbiter, unless there is an arrangement that they are to act without payment.

Awards, Interim or Final.

The Style provides that whatever the arbiters shall determine by awards, interim or final, to be pronounced by them "betwixt and the day of next to come," or on or before any other day to which the submission may be prorogated, which the arbiters are empowered to do at pleasure, shall be binding on the parties.

The first point in this clause is the mention of interim awards. It is always advisable to make special mention of interim awards in the submission. It may sometimes be implied from the nature of the submission that the arbiter has power to pronounce interim awards. For instance, power to pronounce interim awards has been held to be implied in the ancillary arbitration clause contained in a farm lease,[2] and in a like clause contained in a lease of minerals.[3] In the latter case the arbiter pronounced an award on claims for leave to sink a pit, and for damages for delay. The award did not bear to be interim. An additional claim for damages was thereafter lodged, in reply to which a suspension was brought on the ground that the arbiter was *functus*. The Court refused the note, holding, *inter alia*, that as from the terms of the submission any award pronounced in it before the expiry of the

[1] Henderson *v.* Paul, 5 M. 628: the arbiter here was an accountant. M'Callum *v.* Lawrie, F.C. 26th June 1810: the arbiters here were measurers. Murray *v.* North British Railway Co., 2 F. 460.

[2] Lyle *v.* Lyle, 5 D. 236.

[3] Montgomerie *v.* Carrick, 12 D. 274.

lease was necessarily interim, the arbiter was not *functus*. But notwithstanding these decisions the law is not settled that a general submission contains this power merely by implication.

Endurance of Submission.

It is difficult to state a positive proposition as to the endurance of an ordinary submission. But it may safely be said that a submission which does not form part of another contract will, in the absence of any term of endurance specified therein, last for at least a year and a day.

And it has been held by the whole Court that where a submission *in re mercatoria* contained no restriction of the period within which an award must be given, the submission did not fall by the lapse of a year from its date.[1]

Where a submission contains the clause "betwixt and the day of next to come," and there has been no prorogation by the arbiters, the submission may yet be held to have been prorogated *rebus ipsis et factis*,—that is, by the actings of the parties after the expiry of the time period fixed by the submission.[2]

[1] Fleming *v.* Wilson and M'Lellan, 5 S. 906; Hill *v.* Dundee, Perth, and Aberdeen Railway Junction Co., 14 D. 1034. This case of Fleming is sometimes cited as supporting the proposition that "where the submission contains no blank, but refers indefinitely the subjects in question to the decision of arbiters, without limiting them to any determinate time, it ought, like contracts or obligations, to subsist for forty years."—See Mr. Ivory's note to Erskine, iv. 3, 29. But in Fleming's case, which was before the whole Court, the element of homologation was a considerable factor in the decision. The case of Hill was a Lands Clauses submission which had fallen by omission of the statutory prorogation. The Court held that a new submission had been entered into. In the case of Bannatyne *v.* Gibson and Clark, 1 M. 90, the plea that the submission had expired does not seem to have been taken.

[2] Paul *v.* Henderson, 5 M. 613. Where an oversman, who had power to prorogate, on 5th February 1823 prorogated the submission to the day of next, and did not again prorogate till 6th February 1824, the Court refused to reduce the award on the ground that the last prorogation too late.—Earl of Dunmore *v.* M'Inturner, 7 S. 595.

Power of Prorogation.

The Style confers power upon the arbiters or oversman to prorogate the submission. The effect of this is to place the endurance of the submission entirely in their power, provided that they duly and from time to time exercise their power of prorogation. When the parties desire that the submission shall last for an indefinite period, this can be better expressed by words to the effect that "no prorogation of the submission shall be needed, but that the same shall endure until a final award is given." [1]

Obligation to implement Award.

There is next an obligation upon the parties to implement the award under a specified penalty, to be paid by the party failing to the party observing or willing to observe the same. In a deed like a submission an implement clause of this nature is valueless, and may be omitted.

Provision for Death or Bankruptcy of Parties.

The next clause is a declaration that although either or both of the parties shall die or become bankrupt before a final award is given under the submission, it and the award pronounced therein shall nevertheless bind the representatives of the party or parties predeceasing, or the creditors of the party becoming bankrupt.

The provision about bankruptcy is unnecessary. It might be stipulated that the submission should fall by the insolvency of one of the parties, or his sequestration under the Bankruptcy Statutes, but the absence of any mention of bankruptcy would not have the effect of terminating the submission on the bankruptcy of one of the parties.[2]

[1] See further on this subject, *post.* p. 35. Such a clause is sometimes inserted in a submission under the Lands Clauses Act, and has been held by the House of Lords to be effectual,—*post.* pp. 85 and 101.

[2] The law is the same in England,—Russell, p. 112.

It has been decided in Scotland that if one of the parties to an arbitration is sequestrated during its dependence, the trustee in the sequestration should be informed of the arbitration, and given an opportunity of being heard, otherwise the award is reducible on the ground of *parte inaudita*. But if the trustee, after receiving intimation of the arbitration, does not appear therein, his non-appearance will not render the award ineffectual.[1]

The provision as to the death of both or either of the parties is in a different position. This stipulation is essential if the submission is not intended to fall by the death of one of the parties, for an ordinary submission falls by the death of one of the submitters.[2] The reason of this rule is thus stated by Lord Jeffrey in Robertson's case :—"The jurisdiction conferred under an ordinary submission is voluntary in view of the personal qualifications and presumed disposition of the person chosen as judge relative to both of the parties, and therefore one of the parties, unless he has otherwise consented to go on, has a right to say that he shall not proceed in the submission except with his old opponent."[3]

But there are the following exceptions to the rule of law that a submission falls by the death of one of the parties :—

(*a.*) Where the submission itself contains a special provision that it shall not fall by the death of either of the parties.[4]

(*b.*) Where the reference is under the Lands Clauses Act, 1845 (8 Vict. c. 19), sect. 24. This holds even where the reference has been prorogated,[5] and also where the submission contained certain common law clauses, and was therefore partly statutory and partly common law.[6]

[1] Barbour *v.* Wight, F.C. 21st Nov. 1811 ; Grant *v.* Girdwood, F.C. 23d June 1820.

[2] Robertson *v.* Cheynes, 9 D. 599.

[3] The law as to an arbitration falling by the death of one of the parties is the same in England,—Russell, p. 114. But it seems doubtful whether in England the death of one of several parties on one side of a reference would bring it to an end,—*ibid.* p. 115.

[4] Ewing *v.* Dewar, F.C. 19th Dec. 1820.

[5] Caledonian Railway Co. *v.* Lockhart's Trustees, 12 D. 338.

[6] Caledonian Railway Co. *v.* Lockhart, 19 D. 527 ; affirmed, 3 Macq. 808.

(*c.*) Where a submission forms an essential part of another contract (such as a mineral lease), and is necessary for the extrication thereof.[1] It does not follow, however, that a singular successor coming to be in right of such a contract would be bound to submit all questions which might arise on the construction of the contract.[2]

(*d.*) A judicial reference does not fall by the death of one of the parties inasmuch as it is a step in a judicial proceeding.[3]

(*e.*) Where it is part of a contract that some particular of that contract, such as the price, shall be settled by reference to an arbiter;[4] or that an accounting shall be thus settled.[5]

(*f.*) When trustees have entered into a reference on behalf of the trust, and die during the progress of the submission, it does not thereby fall, as the trust is held to be the true party to the reference.[6]

Use of Evidence in Abortive Submission.

The next clause contains a consent that if no final award shall follow upon the submission, any proof which may have been taken by the arbiters shall be held as legal proof for what it is worth in any after submission or legal proceeding between the parties as to the premises.

The precise effect of such consent to the subsequent use of

The word "hybrid" was applied to such an arbitration,—Lord Wensleysdale's judgment, p. 821. See also Clark *v.* City of Glasgow Union Railway Co., 6 S.L.R. 185.

[1] Montgomerie *v.* Carrick, 10 D. 1387.

[2] Montgomerie *v.* Carrick, *supra*, per Lords Fullerton and Jeffrey.

[3] Watmore *v.* Burns, 1 D. 743.

[4] Earl of Selkirk *v.* Nasmith, M. 627, referred to by Lord Deas in Orrell *v.* Wightman's Trustee, 21 D. 554 (at p. 558), and by Lord Chancellor Campbell in Caledonian Railway Co. *v.* Lockhart, 3 Macq. 808 (at p. 812); Alexander's Trustees *v.* Dymock's Trustees, 10 R. 1189.

[5] Orrell *v.* Wightman's Trustees; Alexander's Trustees *v.* Dymock's Trustees, *supra.*

[6] Alexander's Trustees *v.* Dymock's Trustees, *supra.*

proof led in a submission does not appear to have been determined in any modern case. The clause seems an inexpedient one.[1]

Consent to Registration.

The final clause is a consent to registration of the submission, prorogations, devolutions, and interim or final awards to follow upon it, for preservation and execution. This clause is absolutely necessary if summary diligence upon the award is contemplated by the parties, for an award cannot be recorded for execution, and a charge given thereon, unless the deed of submission itself contains a consent to the award being recorded for execution.[2]

If no consent is contained in the submission itself, it may be supplied by a subsequent probative minute signed by the parties.[3]

Suggested Style of Submission.

In view of what has been said above, it may be useful to suggest the following short but comprehensive Style for the reader's consideration: "We, A. and B., do hereby refer (here specify the matter in dispute) to C. as sole arbiter (or to C. and D. as arbiters), and we empower the said arbiter (or the said arbiters and their oversman), if proof shall be considered necessary, To delegate the taking of said proof, or any part or parts thereof, to a commissioner or commissioners: To make remits to accountants and other men of skill, and to obtain advice on questions of law: To award damages against either party:[4] To give decree against either party: To find suitable remuneration due to himself (or themselves): And we declare that no prorogation of this submission shall be needed, but that the same shall endure till a final award has been given, and shall not fall by the death of either or both of us: And we consent

[1] See Bell, p. 348.

[2] Knox *v.* Hume, M. 625.

[3] Baillie *v.* Pollock, 7 S. 619.

[4] Power to award damages is not implied in every submission, and must usually be given expressly if the parties desire the arbiter to possess it,—Mackay *v.* Leven Police Commissioners, 20 R. 1093, see *post.* p. 45.

to the registration hereof, and of the award or awards, interim or final, to follow hereon, for preservation and execution.—In witness whereof."[1]

Special Case.

By section 19 of the Arbitration Act, 1889,[2] which applies to England only, it is provided:—"Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall if so directed by the Court, state in the form of a special case[3] for the opinion of the Court any question of law arising in the course of the reference."

Where an arbiter makes his award in the form of a special case for the opinion of the Court, an appeal lies to the Court of Appeal from the judgment of a Divisional Court.[4] But it has been held that no appeal lay from an order of a Divisional Court when the arbiter in the course of the submission merely asked the opinion of the Court by way of an interlocutory proceeding to assist him to form his judgment.[5] This, however, appears to have been altered by the Supreme Court of Judicature (Procedure) Act, 1894.[6]

The fact that the arbiter has expressed no opinion on the matter does not bar a party to a submission from applying to the Court to direct the arbiter to state, in the form of a special case for its opinion, a question of law arising in the course of the arbitration. This was decided in the case of a reference to the

[1] For other forms see Moveable Rights, p. 222 *et seq.* The form now given should not be used without consideration, *e.g.*, the power to award damages would be inappropriate in many cases; and the power to the arbiters to find remuneration due to themselves might in some cases require qualification. At p. 15 there will be found a clause suggested for insertion in important submissions for obtaining the decision of the Court on points of law which may arise during the course of the arbitration or at its close.

[2] 52 and 53 Vict. c. 49.

[3] For a form see Crewe, p. 125.

[4] Kirkleatham Local Board *v.* Stockton and Middlesborough Water Board [1893], 1 Q.B. 375; (affirmed on another point [1893], A.C. 444).

[5] *Ibid.;* see also Knight *v.* Tabernacle Permanent Building Society [1892], 2 Q.B. 613.

[6] 57 and 58 Vict. c. 16, sec. 1.

committee of a trade association. It was pointed out by Lord Esher, M.R., that, if the opposite contention had prevailed, an arbiter could prevent an order being made on him to state a case by merely refraining from any statement of his views till his award was published.[1]

If a party to an arbitration *bona fide* requests an arbiter either to state a special case for the opinion of the Court upon a question of law arising in the course of the reference and material for consideration, or to delay his award until such party can himself apply to the Court for an order directing a special case, and the arbiter refuses to comply with either of the requests, he is *prima facie* guilty of a breach of duty towards such party. Such breach of duty is *prima facie* misconduct on the part of the arbiter within the meaning of section 11 of the Arbitration Act, 1889, and will justify the Court in setting aside the award under that section, or in remitting for reconsideration under section 10. But if the application for a special case is frivolous, and is made merely to cause delay, the arbiter will be right to refuse it, and the Court will support him if he does so.[2]

The Arbitration Act, 1889, contains also the following provision:—*Section* 7. "The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power . . . (*b.*) To state an award as to the whole or part thereof in the form of a special case for the opinion of the Court." An award thus put in the form of a special case is sometimes stated alternatively. For instance, in a case under the Lands Clauses Act, the oversman stated his award alternatively (1) on the footing that the company was bound to take only the land contained in their notice to treat; (2) on the footing that the company was bound to take the whole of the property.[3]

It was decided in the same case that the Court of Appeal has

[1] *In re* Spillers *v.* Baker [1897], 1 Q.B. 312. See also Knight *v.* Tabernacle Permanent Building Society [1892], A.C. 298.

[2] *In re* Palmer and Co. *v.* Hosken and Co. [1898], 1 Q.B. 131.

[3] *In re* Gonty *v.* Manchester, Sheffield, and Lincoln Railway [1896], 2 Q.B. 439.

power under the Arbitration Act to deal with the costs of an appeal on an award stated in the form of a special case.[1]

It is much to be regretted that there are no provisions in the law of Scotland corresponding to sections 19 and 7 (*b*) of the English Arbitration Act, 1889; and until this defect can be remedied by legislation, it is suggested that a clause somewhat as follows might with advantage be inserted in submissions of importance immediately before the consent to registration :—

" The parties agree that it shall be in the power of either party at any stage of the proceedings under this submission to require the said arbiter (or the said arbiters or their oversman) to state a case for the opinion of the Court on any question of law arising in the course of the reference; and upon such requisition the said arbiter (or the said arbiters or their oversman) shall be bound to state such case. They further agree that the said arbiter (or the said arbiters or their oversman) may at any stage of the proceedings under this submission state a case for the opinion of the Court on any question of law arising in the course of the reference. The case for the opinion of the Court shall as nearly as may be follow the form of a stated case provided by the Act of Sederunt of 3d June 1898 anent the Workmen's Compensation Act, 1897, or such other form as the Court may prescribe. The parties further agree that the said arbiter (or the said arbiters or their oversman) may express his or their award or awards, interim or final (with or without alternative findings) as to the whole or part of the matters referred, in the form of such a stated case for the opinion of the Court."

Stamp Duties.

When a submission contains a consent to registration for preservation or for preservation and execution, it should be impressed with a deed stamp of ten shillings. But when a submission does

[1] See Fleming *v.* District Committee of the Middle Ward of Lanarkshire, 23 R. 98; and Caledonian Railway Co. *v.* Turcan, 25 R. (H.L.) 7,—two Scots cases in which the arbiters stated their awards alternatively.

not contain a consent to registration it is treated as an agreement, and is sufficiently stamped with sixpence.

Provisions implied in an English Submission.

The following is the First Schedule of the Arbitration Act, 1889. It contains the provisions which, so far as they are applicable to the particular reference, are in England now implied in every submission, unless a contrary intention is expressed therein :[1]

"*a.* If no other mode of reference is provided, the reference shall be to a single arbitrator.

"*b.* If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

"*c.* The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

"*d.* If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

"*e.* The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.

"*f.* The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or

[1] 52 and 53 Vict. c. 49.

umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

"*g.* The witnesses on the reference shall, if the arbitrators or umpire thinks fit, be examined on oath or affirmation.

"*h.* The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

"*i.* The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client."

Submission by Trust-Deed and Deed of Accession.

A deed of accession by creditors sometimes takes the form of a submission to the trustee by them and by the granter of the trust-deed for behoof of creditors.[1]

Verbal Submission.

There have been some cases about verbal submissions.[2] It is, however, doubtful how far such a submission would now be sustained. In the case of Otto,[3] Lord Justice-Clerk Inglis indicated his opinion to be that a verbal submission for the adjustment

[1] Earl of Kintore *v.* Union Bank, 24 D. 59 ; see also Moveable Rights, p. 233.

[2] Livingston *v.* Falhouse Feuars, M. 12,409, and Ferrie *v.* Mitchell, 3 S. 113.

Otto *v.* Weir, 9 M. 660.

of marches between small properties, if followed by implement of the award, would bind the parties who entered into the submission.[1]

The Act of Regulation of 1695 (which is afterwards dealt with,[2] and which declares that awards shall not be open to reduction except on proof of corruption, bribery, or falsehood), is only applicable to awards following on "subscribed" submissions.

Informal Submissions.

It is competent to constitute a submission by letters.[3] This form of submission is most frequently found *in re mercatoria*, but the contract of submission can in any case be constituted by correspondence,[4] provided the letters are clear and distinct in their terms, and that the parties meant to bind the bargain by the letters, and not to suspend it till a formal deed has been executed.

In a mercantile reference it has been held to be competent to submit a question as to the quality of goods to a firm of analysts, and sufficient that the work of the submission,—that is, the necessary analysis,—should be done by one member of the firm.[5]

The contract of arbitration may be constituted by a joint case for the opinion and decision of a lawyer.[6] The contract is also constituted by an agreement that accounts shall be audited by an accountant, and that his certificate shall be binding on the parties to the agreement.[7]

Ancillary Submissions.

A submission may form part of another deed or contract,

[1] A parole submission is competent in England,—Russell, p. 44.

[2] *Post.* p. 60.

[3] Dykes *v.* Roy, 7 M. 357; Hope *v.* Crookston, 17 R. 868. As to informal award in informal submissions, see *post.* p. 54.

[4] MacLellan *v.* MacLeod, 4 W. & S. 157 (submission between landlord and tenant).

[5] Dixon, Limited, *v.* Jones, Heard, and Ingram, 11 R. 739.

[6] Fraser *v.* Lovat, 7 Bell's App. 171. In Scotland such a joint case is usually written upon unstamped paper. A joint case for decision of counsel is in England sometimes written upon paper impressed with a sixpenny stamp.

[7] Teacher *v.* Calder, 1 F. (H.L.) 39.

the submission being not the main purpose of the deed or contract, but ancillary thereto, and designed to provide for the settlement of questions that may be raised with reference to the execution of the main contract.

Such arbitration clauses are to be found in contracts of many different kinds, viz.—agreements for the construction of railways and works, for the building of ships, leases of land and minerals, contracts of copartnery, articles of roup, minutes of sale, and other bilateral deeds.

The Court has been inclined to deal strictly with ancillary submissions, because the ordinary tribunals of the country are thereby excluded. Such executorial submissions have therefore been construed narrowly, and have been held not to extend to questions not clearly included therein, particularly if such questions arise after the completion of the principal contract, or the expiry of its time period.

This principle is of extremely difficult application, as is apparent from the very slight variations in language which have influenced the decisions one way or the other.

The following specimen cases are instructive.

In the case of Levy *v.* Thomsons [1]—a shipbuilding contract—the reference clause was in the following terms: "Any questions or differences . . . relative to the true intent and meaning of the contract or the rights of parties under the same." The claim was for damages for delay in delivering the ships. The Court (per Lord President Inglis, who delivered the leading judgment) considered the arbitration clause brief, but more than usually distinct, and held that it contained nothing to limit its operation to questions arising during the contract. They accordingly decided that a claim for liquidate damages and the defence to that claim (which was practically that there had been justifiable delay) fell within the reference clause.

In the case of Mackay,[2] the contract was for the construction of waterworks. The reference clause was as follows: "Any

[1] Levy and Co. *v.* Thomsons, 10 R. 1134.

[2] Mackay *v.* Barry Parochial Board, 10 R. 1046.

dispute . . . as to the true nature, sufficiency, times, or extent of the work intended to be performed under the specification and drawings, or as to the works having been duly and properly completed, or as to the construction of these presents, or as to any matter, or claim, or obligation whatever arising out of or in connection with the works." The claim by the contractor, which was for alterations and extras, arose shortly after the completion of the works. The Court held that this was substantially a claim for the balance of the price of the contract work, and that it fell within the reference clause.[1]

The reference clause in the case of Duff[2] was as follows: "If at any time before the commencement, or during the progress, or during the period of maintenance of the works, or after the completion of the contract, any disputes or differences shall arise between the employer and the contractor . . . as to the true intent, construction, or meaning of this specification, or of the said drawings or schedules of quantities, or of the contractor's tender or acceptance thereof, or of any of the conditions contained in each and all of these, or of anything to be contained in the formal contract to be entered into as herein provided, or as to the terms in which such contract shall be framed, or as to the manner of executing or protecting or maintaining the works contracted for, or as to the quality of the materials employed or proposed to be employed therein, or as to the measurement or valuation of the works executed under the contract, or the amount of any advances to be made to the contractor, or as to any claims for additional or extra works, or as to any claims of deduction for or in respect of alterations or diminutions on the works, or as to any charge account, cost, expenses, or damages made or claimed by the employer against or from the contractor or his foresaids or sureties, or made or claimed by the contractor or his foresaids, against or

[1] This judgment was referred to with approval by Lord President Inglis in the case of Beattie *v.* M'Gregor, 10 R. 1094, and by Lord President Robertson in the case of Wright *v.* Greenock and Port-Glasgow Tramways Co., 29 S.L.R. 53.

[2] Duff *v.* Pirie, 21 R. 80.

from the employer, arising out of the execution, or the failure in the execution, of the works, or any part thereof, or arising out of or payable by reason of the performance, or the failure in the performance, of any of the obligations undertaken by the parties in the contract, and generally as to the rights or obligations of either party under this contract, or any matter or thing, whether of the nature above specified or of any other kind, as well non-executorial as executorial, arising out of or in any way connected with the execution of or failure to execute the works contracted for, or the performance of or failure to perform any of the obligations undertaken by the parties, or the exercise of any of the powers conferred on them, or arising out of or in any way connected with the contract, then all such disputes and differences shall be submitted and referred to the decision, final sentence, and decreet-arbitral of the said John Willet, whom failing, of William Smith, M. Inst. C.E., Aberdeen, presently engineer to the Aberdeen Harbour Commissioners; and whatever the said arbiters shall respectively determine in the premises, in whole or in part, by award or awards, decreet or decreets arbitral, whether interim or final, to be pronounced by them respectively, the employer and the contractor . . . shall be bound to acquiesce in, implement, and fulfil to each other; which submission shall not fall by lapse of year and day, nor by the death or bankruptcy of . . . the employer or the contractor; the said arbiters respectively having full power not only to determine the liability of any of the parties to the other for or in respect of the claims, charges, costs, expenses, or damages as to which any dispute or difference is referred, but also conclusively to assess and fix the amount thereof, as well as to award all the costs incurred under said submission. The said submission shall be held to exclude the jurisdiction of any court of law in reference to any of the matters before referred to."

Upon this clause Lord President Robertson remarked: "The reference clause in the contract is one of great and remarkable latitude."[1]

[1] At p. 88. A study of this clause shows that before framing it the draftsman not only considered the law of arbitration, but also went carefully over the clauses of the contract. The clause, therefore, could not be safely

Pearson *v.* Oswald[1]—the case of a mineral lease—is in contrast. The arbiter was a mining engineer, and the reference was of "any disputes or differences . . . as to the meaning or execution of these presents." The question arose after the expiry of the lease, and was substantially as to whether or not there had during its currency been excessive working of the minerals let. The Court held that the question did not fall within the submission. Varying stress was laid on the fact that it did not arise until after the expiry of the lease.

Further cases to the same effect as Pearson *v.* Oswald are those of Kirkwood,[2] Savile Street Foundry,[3] and Beattie.[4]

In the case of Beattie, Lord President Inglis in his judgment compared the arbitration clause before the Court with that in Mackay's case. For facility of reference the two clauses are here given in parallel columns.

"Any dispute as to the true nature, sufficiency, times, or extent of the work intended to be performed under the specification and drawings, or as to the works having been duly and properly completed, or as to the construction of these presents, or as to any matter or claim or obligation whatever arising out of or in connection with the works."[5]

"Should any difference arise between the proprietor and any of the contractors in regard to the time, meaning of the plans, drawings, or specifications, or the manner in which the work is to be executed, or any matter arising thereout or connected therewith, the same is hereby submitted to the amicable decision of W. H. B."[6]

The differences in expression, it will be seen, are very slight.

used in another case, unless the terms of the contract happened to be substantially identical.

There is sometimes inserted in such arbitration clauses, when one of the parties is a company, a provision that the arbiters in succession shall not be disqualified by being or becoming holders of stock or shares in the company.

[1] Pearson *v.* Oswald, 21 D. 419. In the case of Shotts Iron Co. *v.* Dempster, 29 S.L.R. 40, Lord Low held that certain claims by the Company fell within the reference clause, but that certain counter claims by the defender did not. The second point only was reclaimed to the Inner House, when the Lord Ordinary's judgment upon it was affirmed. See also Wolski *v.* M'Intyre, 1 S.L.R. 100.

[2] Kirkwood *v.* Morrison, 5 R. 79.

[3] Savile Street Foundry Co. *v.* Rothesay Tramways Co., 10 R. 821.

[4] Beattie *v.* Macgregor, 10 R. 1094; see also Caledonian Railway Co. *v.* Greenock and Wemyss Bay Railway Co., 9 S.L.R. 157.

[5] Mackay *v.* Barry Parochial Board, 10 R. 1046.

[6] Beattie *v.* Macgregor, *supra*.

It has been decided that where the time period in a mercantile contract (such as a charter-party) is extended, the ancillary submission clause contained therein applies to the extended period, although not specially mentioned in the agreement for extension.[1]

In England it has been held that an arbitration clause in a contract of copartnery continues to apply to the partnership when that has been prolonged by a mere verbal arrangement after the expiry of the term in the written contract.[2]

In a case arising out of certain railway construction contracts, of which the first alone contained an arbitration clause, it was held that the arbiter's powers had been by the actings of parties so extended that it was competent for him to deal with claims arising under two later and subordinate contracts, and therefore that his award as regards such claims was not reducible as *ultra fines compromissi*.[3]

In the same case it was also held that although there had been a partial alteration in the railway construction works under the original contract, the clause of submission remained effectual as regards the modified works.[4]

The nature of the questions which may arise under the arbitration clause in a construction contract, and the attitude of the Court to such questions, is well illustrated by a recent case.[5] A contractor raised an action against his employer for payment of (1) a sum due to him for work executed; (2) damages for breach of contract on the part of the employer. It was maintained that the second branch of the claim did not fall under the arbitration clause, which was expressed in somewhat restricted terms. Lord Low (Ordinary)

[1] Birrell *v.* M'Culloch and Fyfe, 5 M. 94.

[2] Russell, p. 44; Lindley, p. 412; Gillett *v.* Thornton, L.R. 19 Eq. 599. In this case the original term of the partnership was for one year. The law on this point is not altered by sect. 27 of the Partnership Act, 1890.

[3] North British Railway Co. *v.* Barr, 18 D. 102; see also Fraser *v.* Connell, 6 S.L.R. 214 (claim for extra work).

[4] *Ibid.*

[5] Barr *v.* Commissioners of Queensferry, 36 S.L.R. 448. See also Hunter *v.* Milburn, 6 S.L.R. 525.

allowed a proof of the pursuer's averments, but the Inner House sisted the case that the arbiter might in the first place decide the matters which were within his competence.

When in an action on a construction contract it is maintained in defence that the pursuer's claim falls under the arbitration clause in the contract, the plea in law for the defence ought to be stated somewhat as follows:—"In respect that the question raised by condescendence . . . and answer . . . relative to the quantity and quality of the work done by the pursuer falls to be determined by the arbiter named in the contract founded on, the action ought to be sisted pending his determination of that question."[1]

Where a contract for the supply of goods contained the following arbitration clause—"The Council of the Beetroot Sugar Association of London is the referee of all disputes," the Court held that a rule of the Association as to fixing official prices had been imported into the contract, and that the defender was bound by that rule, although he was not a member of the Association.[2] In a later case, however, where a similar contract had been entered into by a broker as agent for the pursuer, it was held (*diss.* Lord Young) that the question whether the pursuer was a party to the contract fell to be decided by the Court, and that, as the pursuer had neither signed the contract nor a writing confirming it, he was not a party to the contract, and had no title to sign.[3]

A distinction was formerly drawn between ancillary submissions where the arbiters were named and those where they were not named.

It was long an established rule of the law of Scotland that a general agreement to refer future disputes, if and when they should arise, to a person who should then be holder of a certain office, or to unnamed arbiters, was not binding.[4]

An exception to this rule had, however, also been established.

[1] Wilson and M'Farlane *v.* Stewart, 25 R. 655.
[2] Stewart and Co. *v.* Grime, 24 R. 414.
[3] Ransohoff and Wissler *v.* Burrell, 25 R. 284.
[4] Campbell *v.* Shaws Water Co., 2 M. 1130.

The exception applied (1) where the ascertainment of a point essential to the extrication of a special stipulation of a contract was made part of the stipulation itself, as, for instance, where parties "bind themselves to pay and receive a sum to be fixed by men mutually chosen, or to accept their opinion as the criterion of the existence or non-existence of some contingency on which the obligation of parties is by the contract dependent;"[1] (2) where the obligation to refer was incorporated in and made an integral part of the contract,—in other words, where it was a condition precedent thereto.[2]

The rule was also limited strictly to cases where the reference was of future in contradistinction to existing disputes. In a recent case the question was, which of two parishes had to undertake the support of a pauper. The two parishes agreed to refer this question of the pauper's settlement to a body called the Society of Inspectors of Poor for Scotland as arbiters. The Second Division of the Court of Session (Lord Benholme dissenting) held that such a reference was incompetent. The House of Lords, however, reversed this decision, holding that there was no invalidity in a reference of a dispute which had actually arisen to a Society consisting of a number of members, even when their names were not specially before the Parochial Boards who entered into the submission.[3]

The rule of the law of Scotland as to the incompetency of referring future disputes to unnamed arbiters has often, especially within recent years, been commented on unfavourably in judicial decisions. In the case of the Steel Company of Scotland *v.* Tancred, Arrol, and Co.,[4] Lord Bramwell went so far as to say—"I confess that as matter of reasoning I cannot understand it." . .

[1] Lord Fullerton in Hendry's Trustees *v.* Renton, 13 D. 1001 (at p. 1006), quoted by Lord Cowan in Merry and Cunninghame *v.* Brown, 21 D. 1337, at p. 1347.

[2] Caledonian Insurance Co. *v.* Gilmour, 20 R. (H.L.) 13 ; Bidston *v.* Dog, &c. Insurance Co., 32 S.L.R. 516 (Outer House, Lord Wellwood).

[3] Elgin Lunacy Board *v.* Bremner and Elder, 1 R. 1155 ; 2 R. (H.L.) 136.

[4] Steel Co. of Scotland *v.* Tancred, Arrol, and Co., 15 R. 215 ; 17 R. (H.L.) 31, at p. 37.

"However, my noble and learned friend opposite (Lord Watson) says, and the Judges in the Court of Session have said, what the law is, and therefore we may take it upon the sort of argument which was used when none other could be found, and say, according to the Norman-French maxim, 'C'est un ancien positive ley del Corone,' independently of all reasoning upon the matter."

In the case of Hamlyn *v.* Talisker Distillery Company, Lord Watson remarked that in his view[1] the rule that a reference to unnamed arbitrators cannot be enforced did not rest upon any essential considerations of public policy. He added that, even if an opposite inference were deducible from the authorities by which it was established, the rule had been so largely trenched upon by the legislation of the last fifty years, both in general and in local and personal Acts, that he would hesitate to affirm that the policy upon which it was originally based could now be regarded as of cardinal importance.

This rule, however, no longer exists, and the old doctrine has been entirely set aside by section 1 of the Arbitration (Scotland) Act, 1894, which enacts:—"From and after the passing of this Act, an agreement to refer to arbitration shall not be invalid or ineffectual by reason of the reference being to a person not named, or to a person to be named by another person, or to a person merely described as the holder for the time being of any office or appointment."

In a contract for the sale of timber it was provided that any dispute arising should be referred to arbitration "in the customary manner of the timber trade." On a proof it appeared that the usual or customary manner of arbitration in that trade is for each party to appoint an arbiter, with power to the arbiters so appointed to name an oversman. And the Court held that the arbitration clause was valid under this section.[2]

Machinery for carrying out a submission when one of the parties proves recalcitrant is also provided by the Act. In

[1] Hamlyn *v.* Talisker Distillery Co., 21 R. (H.L.) 21, at p. 27.
[2] Douglas and Co. *v.* Stiven, 2 F. 575.

particular, the appointment by the Court, where necessary, of a single arbiter, or of one of two arbiters, is made competent by sections 2 and 3 of the Act, which are as follows:—

"2. Should one of the parties to an agreement to refer to a single arbiter refuse to concur in the nomination of such arbiter, and should no provision have been made for carrying out the reference in that event, or should such provision have failed, an arbiter may be appointed by the Court, on the application of any party to the agreement, and the arbiter so appointed shall have the same powers as if he had been duly nominated by all the parties.

"3. Should one of the parties to an agreement to refer to two arbiters refuse to name an arbiter, in terms of the agreement, and should no provision have been made for carrying out the reference in that event, or should such provision have failed, an arbiter may be appointed by the Court, on the application of the other party, and the arbiter so appointed shall have the same powers as if he had been duly nominated by the party so refusing."

By section 6 "the Court" is defined for the purposes of the Act as meaning "any Sheriff having jurisdiction or any Lord Ordinary of the Court of Session."

CHAPTER II.

ACCEPTANCE OF THE SUBMISSION.

THE arbiter or arbiters should accept the submission in writing. This acceptance is usually endorsed upon the submission, and is frequently combined with the appointment of an oversman and of a clerk. The acceptance does not need to be tested; but in practice it usually has a testing clause.

The acceptance is in the following or like words:—"I, A., arbiter (or we, A. and B., arbiters) appointed by the foregoing submission, hereby accept the reference (and we appoint C. to be oversman and D. to be clerk).—In witness whereof."[1]

Sometimes the appointment of the clerk is made in these words:—"And we appoint D. to be clerk and legal assessor to the reference." A frequent object of the insertion of the words "legal assessor" is to enable the clerk to make law-agent's charges for the work done by him. But while arbiters in an ordinary submission are entitled to legal advice where that is necessary, it may well be doubted whether the insertion by them of the words "legal assessor" in the appointment of the clerk will entitle him to make law-agent's charges for purely clerical business.[2]

A sole arbiter or an oversman who has accepted a reference cannot resign, or decline to proceed with the submission and to pronounce an award,[3] save for some such good reason as ill-health, prolonged absence from the country, or an emerging interest of his own.

In England this matter is regulated by the Arbitration Act, 1889, section 5, which is as follows:—

[1] See also Moveable Rights, p. 235.

[2] See *post*. p. 51, as to the duties of the clerk.

[3] Marshall *v*. Edinburgh and Glasgow Railway Co., 15 D. 603.

In any of the following cases:—

(*a.*) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator:

" (*b.*) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy:

" (*c.*) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, and do not appoint him:

" (*d.*) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy:

" any party may serve the other parties, or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

" If the appointment is not made within seven clear days after the service of the notice, the Court" (that is, Her Majesty's High Court of Justice), " or a judge," (that is, a judge of the said High Court), " may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

It was held in an old case that one of two arbiters could not be compelled to proceed with a submission.[1]

In England this matter is regulated by the Arbitration Act, 1889, section 6, which is as follows:—

" Where a submission provides that the reference shall be to

[1] White *v.* Fergus, M. 633, and F.C. 7th July 1796.

two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

"(*a.*) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place:

"(*b.*) If on such a reference one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties, as if he had been appointed by consent:

"Provided that the Court or a judge may set aside any appointment made in pursuance of this section."

In a recent case application was made to the Court by way of summary petition to the First Division to ordain one of two arbiters to join with his co-arbiter in issuing the award.[1] The prayer was:—"To ordain the said A. to join with the said B., within such short time as your Lordships may fix, in making and issuing, as arbiters aforesaid, an award under the said reference, fixing the value of the subjects particularly set forth in said deed of submission; or otherwise, in the event of the said A. and B. differing in opinion as to said value within such time, to ordain the said A. to join with the said B., within such further time as your Lordships may fix, in executing a minute of devolution devolving the said submission upon the said C., the oversman nominated and appointed by said arbiters in said reference to decide in the said submission in the event of the said arbiters differing in opinion." This prayer, it will be observed, only meets

[1] Watson *v.* Robertson, 22 R. 362. This case was about an arbitration as to the sum to be paid by a landlord to his mineral tenant for plant taken over at the end of the lease.

a case where one of the arbiters is willing to proceed, and where an oversman has already been appointed.

Lord President Robertson observed: "I do not think that a summary petition is an appropriate proceeding for deciding such questions. To say so is not the same as saying—and I do not say—that a summary petition to compel arbiters to proceed in a submission is on the face of it and necessarily an incompetent proceeding. It may quite well be that when some specific duty is plainly and immediately incumbent on an arbiter the Court may be asked by summary petition to order him to do it, and the mere fact that an ordinary action would lie for the same purpose would not necessarily exclude the competency of the application. . . . On an examination of the averments here, I think that there are questions to try of some complexity and involving disputed facts, and that a petition is therefore an inappropriate proceeding."

The Court of Session alone has jurisdiction to compel arbiters to proceed with a reference, the reason being that an arbiter occupies a position analogous to that of an inferior judge.[1] Lord Shand in Forbes' case expressly reserved his opinion whether it may not be competent for a sheriff to ordain arbiters to proceed who have simply been appointed as valuators to fix a price.

Death of Arbiter.

In Scotland the death of a sole arbiter, or of one of two arbiters, brings an ordinary submission to an end.[2]

In England the death of an arbitrator had formerly the effect of bringing the submission to an end.[3] This matter is now regulated in England by the Arbitration Act, 1889, sections 5 and 6.[4]

[1] Forbes *v.* Underwood, 13 R. 465; *cf. per contra* Sinclair *v.* Fraser, 11 R. 1139.

[2] See *post.* p. 94 as to submissions under the Lands Clauses Act.

[3] Russell, p. 113.

[4] 52 and 53 Vict. c. 49. *Supra*, pp. 28 and 29.

Appointment of Oversman.[1]

In a formal submission the oversman can be appointed only by a written devolution upon him. It is incompetent in such a submission to prove by parole either that an oversman was appointed or that the arbiters had differed in opinion and devolved the submission upon him.[2] But where the submission is informal a written devolution on the oversman is not required.[3] In a case occurring in the year 1784 relating to a formal submission where the oversman was appointed in the submission itself, which also provided that if the two arbiters should differ in opinion the award might be given by either of them and the oversman, the House of Lords seems to have decided that a written devolution upon the oversman was not required,[4] and that parole proof was competent to expiscate whether a difference of opinion had taken place.

When arbiters in a formal submission differ in opinion, and devolve the submission upon the oversman, the devolution must be of the whole matters referred, unless the deed of submission confers on the arbiters special power to pronounce interim decrees-arbitral, and to devolve on the oversman only the points upon which they differ.[5]

Where, however, the oversman has been appointed at the beginning of the proceedings it is usual and proper for the arbiters to consult him on the whole matters referred to them.[6]

As regards the matters devolved on him, an oversman occupies the position of a sole arbiter.

It has been held in England that where two arbiters toss up which of them shall nominate the oversman, the appointment thus made is bad.

It has also been decided there that where each arbiter wrote

[1] See also *supra*, p. 3.
[2] Frederick *v.* Maitland and Cuningham, 3 M. 1069.
[3] Hope *v.* Crookston, 17 R. 868.
[4] Colquhoun *v.* Corbet, 2 Paton's App. 626.
[5] Frederick *v.* Maitland and Cuningham, *supra*.
[6] Crawford *v.* Paterson, 20 D. 488 ; Hope *v.* Crookston 17 R. 868.

upon a piece of paper the name of a man not known to the other, and the one drawn by chance was appointed oversman, the appointment thus made was bad.[1]

But it has been decided, both in Scotland and in England, that where two arbiters, after each suggesting a man whom the other acknowledged to be eligible for the office, then proceeded to decide by lot which of the two should be appointed, the appointment was valid as having been made by choice and not by chance.[2]

The reason of this rule is thus stated by Lord Chief-Justice Cockburn :—"Where there is a concurrent judgment expressed by the arbitrators that the person eventually appointed is a fit person, there is no reason why, because they have determined by lot between A. and B., both equally fit, the award should be set aside."[3]

It appears to be law in England that if the oversman first chosen shall refuse to act, the arbiters can name another oversman.[4] This point has not arisen for decision in Scotland, but it is thought that the same view would be taken.

It has been held that the devolution of a submission upon the oversman does not by itself import a prorogation.[5]

By section 4 of the Arbitration (Scotland) Act, 1894, it is now enacted :—"Unless the agreement to refer shall otherwise provide, arbiters shall have power to name an oversman on whom the reference shall be devolved in the event of their differing in opinion. Should the arbiters fail to agree in the nomination of an oversman, the Court may, on the application of any party to the agreement, appoint an oversman. The decision of such oversman, whether he has been named by the arbiters or appointed by the Court, shall be final."

The Court is by section 6 interpreted to mean any Sheriff having jurisdiction, "or any Lord Ordinary of the Court of Session."

[1] See Russell, p. 163, and cases there cited.

[2] Smith *v.* Liverpool, London, and Globe Insurance Co., 14 R. 931 ; Russell, p. 232, and cases there cited.

[3] *In re* Hopper, L.R. 2 Q.B. 367.

[4] Russell, p. 165.

[5] Thomson *v.* Norton, F.C. 28th Jan. 1818.

A petition for the appointment of oversman may be presented by any party to the agreement to refer, and should set out the facts, and in particular that the arbiters have failed to agree upon an oversman. The prayer of the petition may be as follows:—

> "May it therefore please your Lordships to appoint this petition to be intimated on the walls and in the minute-book in common form, and to be served upon the said (the other party to the submission), and to ordain him to lodge answers thereto, if he any has, within eight days after such service; and on resuming consideration hereof, with or without answers, to appoint such person as to your Lordships shall seem proper to be oversman in the said reference; or to do further or otherwise in the premises as to your Lordships shall seem proper."

When the oversman is chosen by the arbiters his acceptance of office may be in the following terms:—"I, C., designed in the foregoing minute by the arbiters, do hereby accept of the appointment of oversman under the foregoing submission, and agree to act as such.—In witness whereof."

When the arbiters fail to agree upon an oversman, and an oversman is appointed by the Court, his acceptance of office may be in the following terms:—"I, C. (designation),—Whereas A. B., being one of the parties to the foregoing submission, presented a petition to the Lords of Council and Session, Division, Lord Ordinary, setting forth that the arbiters had failed to agree on the nomination of an oversman, and craving their Lordships, in virtue of 'The Arbitration (Scotland) Act, 1894,' section 5, to appoint an oversman under said submission: And whereas by interlocutor dated the said Lord Ordinary appointed me to be oversman under said submission—Therefore I do hereby accept of said office of oversman, and agree to act as such.—In witness whereof."

In both cases formal attestation by two witnesses, though not essential, is usual and expedient.

Prorogation by Arbiters and Oversman.

Where a submission contains power to the arbiters to pronounce interim awards, and also power to them and to the oversman to prorogate the submission, the arbiters can pronounce interim awards as to certain matters, and devolve the matters not so dealt with on the oversman.[1]

But if the arbiters fail to pronounce a competent award on the matters dealt with by them within the period to which they have themselves prorogated the submission, a prorogation by the oversman will not keep the submission alive save as to the matters devolved on himself.[2]

Where the submission, besides empowering the arbiters to appoint an oversman, also confers on them power to prorogate, it would appear that power to the oversman to prorogate is implied.[3]

The prorogation of submissions under the Lands Clauses Acts is dealt with hereafter.[4]

Forms of Prorogation and Devolution.

As to the prorogation of a submission, reference is made to what has been already said as to the modern practice.[5] There are no special words of style required for prorogation. It is sufficient to endorse on the deed of submission a short minute in such words as the following :—"The parties to the foregoing submission hereby extend the time period of the submission to the day of (the precise date being expressed).—In witness whereof." If previous prorogations have been granted, the minute should be framed thus,—"Hereby *further* extend." Where the arbiters have by the submission express power to prorogate, the

[1] Lang *v.* Brown, 15 D. 38, reversed 2 Macq. 93, per Lord Chancellor Cranworth, at p. 96.

[2] Lang *v.* Brown, *supra.*

[3] Glover *v.* Glover, 4 Pat. App. 655, referred to in Lord Wood's note in Lang *v.* Brown, *supra.*

[4] *Post.* p. 99.

[5] *Supra*, p. 9.

minute of prorogation will be as follows:—"The arbiters appointed by the foregoing submission hereby extend," &c.[1]

Minutes of prorogation and devolution and similar writings granted by arbiters do not require to be tested.[2] It is, however the usual practice to have them executed with the ordinary formalities. No stamp is required for such writings.[3] The devolution of an ordinary submission may be thus expressed: "We, A. and B., arbiters appointed in the foregoing submission, considering that we have differed in opinion as to the matters referred to us, do hereby devolve the submission on C., the oversman already chosen by us." A form of minute of devolution by arbiters who have differed in opinion as to part of the matters referred to them will be found in the Juridical Styles.[4]

Disqualification of Arbiters or Oversman.

It has been held to be an absolute disqualification of an oversman that he was a shareholder (although to a small amount) in a company which was one of the parties to a reference.[5] But this disqualification would not hold if the parties had antecedent knowledge of the fact, or, having come to know of it after the appointment, should agree to waive the objection.

In the infancy of railways, it was decided in the case of Phipps[6] that the engineer of a railway who was sole arbiter under a construction contract, and who during the progress of a submission under that contract between the railway company and the contractor was appointed manager of the railway, was not thereby disqualified.

By an Act of Parliament all questions arising between an underground railway company and the corporation of the town in which the railway was to be constructed were referred to the deter-

[1] For forms of prorogation see Moveable Rights, pp. 236 *et seq.*, and Bell, p. 422.

[2] Kirkaldy *v.* Dalgairns, F.C. 16th June 1809.

[3] Paterson *v.* Sanderson, 7 S. 616, supported by inveterate practice.

[4] Moveable Rights, p. 238.

[5] Smith *v.* Liverpool, London, and Globe Insurance Co., 14 R. 931; *cf.* note 1, p. 21.

[6] Phipps *v.* Edinburgh and Glasgow Railway Co., 5 D. 1025.

mination of an arbiter, to be agreed upon by the company and the corporation. A civil engineer was appointed arbiter. Thereafter the same engineer was consulted by the corporation as to certain sewage works for the construction of which the corporation had obtained Parliamentary powers. The Court held that the arbiter had disqualified himself from acting as arbiter, not only as to questions between the company and the corporation arising out of the execution of the sewage works (if any question as to the sewage works should arise), but also as to all questions arising under the company's Act of Parliament, because that Act contemplated a single standing arbiter.[1]

Many cases have occurred where the engineer of the works in course of construction, or some other person in a like position, has been nominated arbiter in an ancillary reference, and has been objected to on the ground that he had already taken sides in disputes arising under the contract with one of the parties to the contract against the other.

The law on this point, as settled by Scotch decisions, may be stated as follows :—

(*a.*) Where in a contract for works an arbiter is named who occupies such a position as that of architect, engineer, or consulting engineer to the works, he is not disqualified from acting as arbiter in consequence merely of his holding that position.[2]

(*b.*) This holds good even if he shall have revised the specifications and schedules upon which the work is executed;[3] or

(*c.*) Shall have urged the contractor to proceed more quickly with the work ;[4] or

(*d.*) Shall have adversely commented on the manner of executing the works.[5]

[1] Caledonian Railway Co. *v.* Magistrates of Glasgow, 25 R. 74.

[2] Shanks' Executors *v.* Aberdeen Railway Co., 12 D. 781 ; Wilson *v.* Caledonian Railway Co., 22 D. 697 ; and Addie *v.* Henderson and Dimmack, 7 R. 79.

[3] Adams *v.* Great North of Scotland Railway Co., 16 R. 843 ; affirmed, 18 R. (H.L.) 1.

[4] Mackay *v.* Barry Parochial Board, 10 R. 1046.

[5] Scott *v.* Carluke Local Authority, 6 R. 616.

(*e.*) But he may be disqualified if he has taken a side against the contractor, *e.g.*, by giving evidence in a litigation concerning the contract.[1]

(*f.*) Vague allegations, however, of supervening disqualification, on account of the arbiter being the party really interested, are not encouraged by the Court.[2]

There are three recent English cases which deal with this matter. In the first of these cases,[3] in which the engineer of the defendant company had been appointed arbitrator, it was held (Lord Justice A. L. Smith dissenting) that a letter written by him to the plaintiff expressing an opinion on the merits after the proceedings in the arbitration had begun did not amount to a prejudgment of the question to be considered by him as arbiter.

In the second case[4] it was held (Lord Justice Davey having had doubts) that where, in a contract for the execution of works, the arbitrator selected by the parties is the servant of one of them, he is not disqualified by the mere fact that under the submission he may have to decide disputes involving the question whether he himself (or a near relative) has acted with due skill and competence.

In the third case[5] it was decided that an arbitration clause referring disputes to the engineer of one party cannot be disregarded on the ground that the engineer is in substance a judge in his own case, unless there is sufficient reason to suspect that he will act unfairly.

In this case Lord Justice Lopes quoted with approval a passage from the judgment of Lord Justice Bowen in Jackson's case, viz.:—

"To an adjudication of such a peculiar reference the engineer cannot be expected, nor was it intended that he should, come with

[1] Dickson *v.* St. Patrick's Church Trustees, 8 M. 566.

[2] Trowsdale *v.* Jopp and North British Railway Co., 2 M. 1334, and 4 M. 31.

[3] Jackson *v.* Barry Railway Co. [1893], 1 Ch. 238.

[4] Eckersley *v.* The Mersey Docks and Harbour Board [1894], 2 Q.B. 667.

[5] Ives and Barker *v.* Willans [1894], 1 Ch. 68.

a mind free from the human weakness of a preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced views which in an ordinary arbitrator are natural and to be looked for, neither party to the contract proposed to exact from the arbitrator of their choice. They knew well that he possibly or probably must be committed to a prior view of his own, and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence."

An advocate is not, by becoming a Judge of the Court of Session, disqualified from proceeding with and disposing of a reference made to and accepted by him while at the bar.[1]

Misconduct by Arbiters outside the Arbitration.

It is a question of circumstances and degree what conduct on the part of an arbiter with relation to the parties during the submission, but outside its proceedings, will render his award liable to challenge either under the Act of Regulation, 1695, or at common law on the ground of misconduct.[2]

An arbiter has been held to have become disqualified by entering into partnership with one of several persons who together formed one of the parties to the submission.[3] But on the other hand, in a very special case, arbiters have been held not to be disqualified who at the time of appointment were the ordinary law-agents of the parties, and who (it was alleged) continued to act openly in the capacity of agents to their respective clients, preparing statements severally on their behalf, consulting with them on the subject, and making professional charges against them.[4]

There have been cases in England (but none in Scotland) as to the effect of hospitality shown by one of the parties to the

[1] Fisher *v.* Colquhoun, 6 D. 1286.

[2] Tranent Coal Co. *v.* Polson, 15 S.L.R. 184; Morison *v.* Thomson's Trs., 8 R. 147.

[3] Tennent *v.* Macdonald, 14 S. 976.

[4] Lyle *v.* Lyle, 5 D. 236.

arbiters and oversman, or certain of them, in the absence of the other party. In the case of Hopper[1] Lord Chief-Justice Cockburn says:—"Nothing remaining but for the umpire to make up his mind and make his award, it so happened that one of the parties, an innkeeper in the town, proposed to the two arbitrators, the umpire, and his own attorney to dine with him, and that proposal is accepted. At that dinner, so far as the umpire is concerned, there seems to have been some excess, and he is afterwards found to be intoxicated and obliged to remain in the inn. No doubt all this was extremely improper and unbecoming. It is to be very much regretted that any one who has to exercise judicial functions should place himself in the position of appearing under obligation to one of the parties even in respect of hospitality; . . . . but I cannot believe, looking at all the circumstances, that the object and intention of Wrightson was to corrupt the umpire, and I do not see the slightest reason for supposing that the umpire was in any way influenced by the hospitality he received." This case was followed in Moseley *v.* Simpson.[2] Here the form of entertainment was luncheon, given on several occasions during the arbitration to the umpire and one of the arbiters.

In a recent case where certain building materials had been sold by public roup, the conditions of sale contained the following arbitration clause:—"The buildings to be taken down, and the materials removed within the time specified, and at the sight and to the satisfaction of James Laird, auctioneer, who is hereby appointed for that purpose, as well as judge of the roup; and in the event of any question or differences arising between the exposers or purchasers, or among the offerers themselves, in regard thereto, or in regard to the subject-matter of these presents, or execution or implement thereof, the same shall be determined by the said James Laird, to whom the same are hereby referred, and whatever he may determine shall be binding and conclusive on the parties."

[1] *Re* Hopper, L.R. 2 Q.B. 367.
[2] Moseley *v.* Simpson, L.R. 16 Eq. 226.

The purchaser of certain lots resold these to A., who paid the price, and also deposited a certain sum as a security for his performance of the conditions of sale. A. resold his purchase to B. Messrs. Laird, the auctioneers, refused to repay the deposit to B., on the ground that the conditions of sale had not been fulfilled. B. then sued the auctioneers, who defended. The Court held that Messrs. Laird having taken upon themselves the defence of the action, Mr. Laird, as a partner of that firm, was disqualified from acting as arbiter.[1]

Under section 11 (1) of the English Arbitration Act, 1889, an arbiter may be removed for misconduct. There is no similar statutory provision applicable to Scotland. But in the exercise of its *nobile officium* the Court of Session would no doubt remove an arbiter for conduct which would have justified the reduction of his award, if given.[2]

Interdict of Arbitration Proceedings.

The Court is unwilling to interfere with a going submission before the arbiters have pronounced their final award.[3]

For example, in the following cases it declined to stop a going submission :—

(*a.*) When the arbiter had issued notes of his proposed findings, but had not pronounced an award, and one of the parties brought both a suspension and an action of declarator that he had disqualified himself by partiality and corruption : [4]

(*b.*) Where the arbiter had pronounced an interim award, and one of the parties brought an action for its reduction on the ground of *parte inaudita* and corruption : [5]

(*c.*) Where it was alleged that the arbiter was about to dispose of a claim alleged to be illegal, as founded on a *pactum de quota litis* : [6]

[1] M'Dougall *v.* Laird, 22 R. 71.
[2] *Cf.* opinion of Jessel, M.R., in Beddow *v.* Beddow, 9 Ch. Div. 89.
[3] For interdict of arbitrations under Lands Clauses Act, see *post.* p. 93.
[4] Drew *v.* Drew and Leburn, 12 D. 983, 14 D. 559 ; affirmed, 2 Macq. 1.
[5] Walls *v.* Connell, 24 D. 1048.
[6] Farrell *v.* Arnot, 19 D. 1000.

(*d.*) Where one of the parties to a complicated submission to two professional accountants, after raising a declarator to have the proceedings declared null in respect that the arbiters had required the parties to sign an obligation for their remuneration, presented a bill of suspension and interdict to prohibit the arbiters from taking any further steps in the submission :[1]

(*e.*) Where, by an Act of Parliament, all questions arising between an underground railway company and the corporation of the town in which the railway was to be constructed were referred to the determination of an arbiter to be chosen by the company and corporation, and an arbiter was chosen who afterwards gave advice to the corporation about a sewage scheme, the Court held, that although the arbiter had disqualified himself, yet that, as no question had actually occurred under the Act of Parliament, or might occur, it was premature to interdict the arbiter from acting under the statute.[2]

Interdict is, however, a perfectly competent form of procedure, and one which the Court will adopt to save the parties unnecessary expense and litigation whenever it is plain on the face of the matter that the arbiter does not possess the power which he is called upon to exercise.[3]

[1] Fraser *v.* Gordon, 12 S. 887.

[2] Caledonian Railway Co. *v.* Magistrates of Glasgow, 25 R. 74.

[3] Glasgow and South-Western Railway Co. *v.* Caledonian Railway Co., 44 S.J. 29 ; see also Wemyss *v.* Ardrossan Harbour Co., 20 R. 500 ; Callander *v* Smith, 7th July 1900, 37 S.L.R. 890. For the circumstances in which an injunction is granted in England see Russell, pp. 203 and 204.

CHAPTER III.

PROCEDURE IN SUBMISSIONS AND POWERS OF ARBITERS.

In ordinary submissions the arbiters must, as a rule, hear the arguments of the parties.[1] Their failure to give the parties an opportunity of being heard may be a good ground for reduction of their award.

A judicial referee must hear the parties.[2]

In an ordinary formal submission, the usual first step after the arbiters have accepted the submission is an order signed by the arbiters for claim and answers, in the following or like terms:—"The arbiters appoint A. (the claimant) to lodge his claim within days from the date of this order, and ordain B. (the respondent) to answer it within days thereafter."

Any act of importance by the arbiters, such as examining goods, must be done in the presence of both parties, or of their representatives.[3]

The First Division of the Court has, however, held (Lord Curriehill dissenting), in an agricultural submission, that the mere fact that the tenant had met the arbiters upon the ground, and given them information outwith the presence of the landlord, was not a ground for reducing the award.[4]

A similar decision was pronounced in a case about a ship's accounts, where the arbiter got information as to details from third parties.[5]

The fact that the arbiters have refused to receive evidence

[1] Langmuir *v.* Sloan, 2 D. 877.
[2] Glennie *v.* M'Phail, 3 S. 395.
[3] Heggie *v.* Stark and Selkrig, 3 S. 488.
[4] Campbell *v.* M'Holm, 2 M. 271.
[5] Barr *v.* Wilson's Trustee, 15 D. 21 ; see also Hope *v.* Crookston, 17 R. 868.

tendered by the parties, or by one of them, is not in itself an absolute objection to an award.[1]

It may be the duty of an arbiter, where he is himself a man of skill, to refuse to hear evidence.[2]

In Ledingham's case, Lord Justice-Clerk Inglis remarked that the case of Mitchell *v.* Cable[3] was the only case known to him where an award had been reduced on the ground merely that proof had been refused.

When men of skill are appointed to value a subject which is to be transferred from one person to another, or to decide a dispute as to the quality of goods, it is not only unnecessary, but even incompetent, for them to take evidence.[4]

In a submission to men of skill the arbiters may not be bound even to hear the parties.[5]

While it is usual and proper for arbiters, before pronouncing their award, to issue to the parties notes of their proposed findings, the fact that arbiters have not issued such notes will not afford a ground for setting aside the award.[6]

As to the powers of arbiters to order specific things to be done, the following decisions have been given :—

(*a.*) Where a claim for legitim was made, and formed the subject of an action, and a general reference was entered into by the parties of all questions, claims, disputes, and differences, it was held that the arbiters had power to order one of the parties to execute a discharge in favour of the other.[7]

[1] Moubray *v.* Dickson, 10 D. 1102.

[2] Ledingham *v.* Elphinstone, 22 D. 245.

[3] Mitchell *v.* Cable, 10 D. 1297.

[4] Nivison *v.* Howat, 11 R. 182 (valuation of crop between outgoing and incoming tenant); Dixon, Limited, *v.* Jones, Heard, and Ingram, 11 R. 739 (quality of iron ore); Logan *v.* Leadbetter, 15 R. 115 (valuation of waygoing crop).

[5] M'Nair's Trs. *v.* Roxburgh, 17 D. 445 (value of unwrought coal); M'Kenzie *v.* Hill, 40 J. 499; M'Gregor *v.* Stevenson, 9 D. 1056 (repair of houses and fences); Latta *v.* Macrae, 14 D. 641 (damage by archery meeting to grass parks—Lord Cockburn dissenting); Hope *v.* Crookston, 17 R. 868.

[6] M'Callum *v.* Robertson, 3 W. & S. 344.

[7] Tait *v.* Wilson, 9 S. 680.

(*b.*) A railway construction contract contained a reference of disputes and differences. The contractor claimed damages against the company for breach of contract. It was held that it was competent for the arbiter to construe the contract, but not to assess damages.[1] An arbiter, therefore, has no power to assess damages, unless by the submission he is expressly empowered to do so. But he can award liquidate damages if power to that effect is conferred upon him by the submission.[2] He can also award an abatement from the price of goods (which may be called damages) if the submission shows that the parties intended that he should have power to do so.[3]

(*c.*) In a mercantile submission to determine on whom should fall the loss arising from leakage from 500 barrels of petroleum, the arbiter ordered one of the parties to make consignation of a sum of money. The Court held this order to be beyond his powers.[4]

(*d.*) Under a contract for the construction of a harbour, the arbiter ordered the proprietor to remove certain silt from the harbour. If this order had been obligatory, so that the proprietor could have been forced by the contractor to remove the silt, the Court would apparently have found it to be outside the arbiter's powers. It was, however, held that the order merely meant that the contractor was not bound to do certain excavations till the proprietor had removed the silt.[5]

An order for allowing proof may be simply in such words as—"The arbiters allow the parties a proof of their respec-

[1] Aberdeen Railway Co. *v.* Blaikies, 13 D. 527, 1 Macq. 461; M'Alpine *v.* Lanarkshire and Ayrshire Railway Co., 17 R. 113; Mackay *v.* Leven Police Commissioners, 20 R. 1093.

[2] Levy and Co. *v.* Thomsons, 10 R. 1134; Adams *v.* Great North of Scotland Railway Co., 16 R. 843,—this case went to the House of Lords, but on another point.

[3] Hope *v.* Crookston, 17 R. 868.

[4] Cox *v.* Binning, 6 M. 161.

[5] Duff *v.* Pirie, 21 R. 80; see Lord President Robertson at p. 88.

tive averments." Where no averments are made by the party occupying the position of defender or respondent in the arbitration, the order will be—"Allow the claimant a proof of his averments, and the respondent a conjunct probation." But where the defender or respondent does make averments, and both parties are allowed proof, the order will be—"Allow both parties a proof of their averments, and to the claimant a conjunct probation."[1]

A common mistake is to express the order thus—"Allow both parties a proof of their averments, and to either party a conjunct probation." An order allowing proof is frequently combined with an order fixing the diet for proof,[2] and sometimes the following words are prefixed to the same order: "The arbiters close the record on the claim, No. of process, and the answers, No. of process."

Arbiters cannot by their own power compel the attendance of witnesses or havers.

A petition by arbiters for warrant to cite witnesses may be presented either to the Sheriff or to the Court of Session. When presented to the Court of Session it is during session directed to one of the Divisions of the Court, and in vacation to the Lord Ordinary on the Bills.[3]

When the witnesses reside in different counties the petition is to the Court of Session.[4]

The usual procedure is for the arbiters when pronouncing an order for proof to combine with it a recommendation to the Court to grant warrant for citing witnesses and havers. The order is in the following or like terms:—

[1] See the observations of the Lord Justice-Clerk (Inglis) in the case of Magistrates of Edinburgh *v.* Warrender, 1 M. 13. For other usual orders see Moveable Rights, p. 238, and Bell, p. 414.

Forms of orders where one of the parties declined to appear before the arbiter, and the arbiter had therefore to proceed *ex parte*, will be found in the case of Wemyss *v.* Ardrossan Harbour Company, 20 R. 500.

[2] *Post.* p. 47.

[3] Harvey *v.* Gibson, 4 S. 809; Caird, 3 M. 851.

[4] Caird, *supra.*

"The arbiters fix the day of at A.M., and succeeding days, within , as a diet for proof: Further, the arbiters respectfully recommend to all courts of law and judges possessing jurisdiction to grant warrant for citing witnesses and havers on the application of either party."

The petition may be at the instance of one or both of the parties to the arbitration, and must set out shortly the nature of the submission, the order pronounced by the arbiters, and the names of the witnesses and havers whom it is desired to cite.

The prayer of the petition to the Court of Session may be in such terms as the following:—

> "May it therefore please your Lordships to grant warrant to messengers-at-arms, sheriff officers, and others, to cite havers and witnesses at the instance of the petitioner, and, in particular, the said to appear before the said arbiters on , at A.M. with continuation of days, within the , or on such other day or days and at such other place or places as the said arbiters may appoint, to answer all relevant questions having reference to the matters in dispute between the parties to the said submission, and within their knowledge, and to produce all writings in their possession or under their control which relate to the subject-matter of the said submission; and in the event of the said witnesses or havers so to be cited, or any of them, failing to appear in terms of citations or citation under such diligence, to grant warrant for letters of second diligence at the instance of the petitioner against them or him; or to do otherwise or further in the premises as to your Lordships shall seem proper."

Where it is desired to obtain the evidence of English witnesses application should be made to the Court of Session to grant a commission for that purpose. The Court will not grant a warrant to cite a witness resident in England to give evidence in Scotland before an arbiter.[1]

[1] Highland Railway Co. *v.* Mitchell, 6 M. 896.

When an arbiter has recommended the Court to grant warrant for citing havers, his approval should be obtained to the specification of documents before application is made to the Court.[1]

The Court of Session will interpone authority to the appointment by an arbiter of a commissioner to take the examination of havers resident in England, provided that the havers to be cited are named or otherwise sufficiently indicated.[2] In Blaikies' case the prayer of the petition, as amended at the instance of the Court, was as follows :—

> "May it therefore please your Lordships to sanction and confirm the appointment of the commissioners named by the arbiter, and to grant warrant for letters of diligence at the petitioners' instance for citing the partners of the firms of and of , and their managers and clerks, and others in their employment, to appear before the said commissioners, or one or other of them, and to produce such writings falling under the said specification as they may respectively have in their custody or possession; or to do otherwise in the premises as to your Lordships shall seem proper."

When a haver examined before an arbiter objects to produce documents on the ground of confidentiality, it is competent for the party who obtained the diligence, even without a recommendation by the arbiter, to apply by summary petition to the Sheriff in order to have production enforced.[3] The Sheriff must consider and dispose of such an application on its merits; his duty is not purely ministerial.[4]

The following is a specimen of the prayer in such an application :—

> "May it therefore please your Lordship to appoint this petition to be served on the said A. B., and to appoint him to

[1] Crichton *v.* North British Railway Co., 15 R. 784.
[2] Blaikies *v.* Aberdeen Railway Co., 13 D. 1307.
[3] Blaikies *v.* Aberdeen Railway Co., 14 D. 590.
[4] *Ibid.*

lodge answers thereto within eight days, if so advised; and thereafter, with or without answers, to interpone your authority to the order issued by the arbiter on
upon C. D., the law-agent of the said A. B., to produce all letters or writings mentioned in the first and second heads of the specification served upon him in the said submission between the petitioner and respondents, and specially referred to in the deposition of the said C. D. before the arbiter upon ; and to ordain the said C. D. to implement the said order, and to produce the writings called for by the petitioner and ordained by the arbiter in his order foresaid to be produced by him, and that within such short time as your Lordship may appoint; and, failing production of the said writs, to grant warrant to apprehend and incarcerate the said C. D. until he shall produce the same; or to do otherwise as to your Lordship shall seem just."

To this prayer is appended a condescendence of the facts and a note of pleas in law suitable to the circumstances.

When a witness examined before arbiters refuses to answer a question, the party at whose instance the question is put can apply to the Sheriff for an order upon the witness to answer the question.[1] The petition is similar in form to that given above.

The Stamp Act, 1891,[2] contains the following provisions:—

14. (1.) "Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read

[1] Bell, p. 354; Blaikie *v.* Aberdeen Railway Co., 14 D. 590. For forms of petition to the Sheriff see Lees, p. 79 *et seq.*

[2] 54 and 55 Vict. c. 38.

the instrument, or to the arbitrator or referee, of the amount of the unpaid duty and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds."

(2.) "The officer, or arbitrator, or referee receiving the duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment, and of the amount thereof, and shall communicate to the Commissioners [the Commissioners of Inland Revenue] the name or title of the proceeding in which, and of the party from whom, he received the duty and penalty, and the date and description of the instrument, and shall pay over to such person as the Commissioners may appoint the money received by him for the duty and penalty."

(3.) "On production to the Commissioners of any instrument in respect of which any duty or penalty has been paid, together with the receipt, the payment of the duty and penalty shall be denoted on the instrument."

(4.) "Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

The word "instrument," as used in the Stamp Act, includes "every written document."[1] This does not of course mean that every writing is subject to stamp duty, but only the writings which are enumerated in the alphabetical Schedule to the Stamp Act, and also any writing which, although not therein enumerated, is a "deed" in the Scots law sense of that word (excluding a testamentary deed).

In an action for money lent an insufficiently stamped promissory note, purporting to be signed by the defender and expressed to be given for money lent, was put into the defender's

[1] Sec. 122.

hands by the pursuer's counsel for the purpose of refreshing his memory and obtaining from him an admission of the loan. The Court held that the pursuer was entitled to use the promissory note for that purpose notwithstanding the terms of the Stamp Act.[1]

In most formal submissions it is the practice of the arbiter or arbiters to appoint a clerk. The appointment of the clerk where there are two arbiters is usually contained in the same writing by which the oversman is appointed,[2] but the clerk may be appointed by a separate writing. The duties of the clerk to an arbitration may be summarised as follows:—To receive the pleadings and productions and keep an inventory of them; to conduct the correspondence between the arbiters and the parties; to arrange for meetings, and for a diet of proof when proof is ordered;[3] to issue notes of the arbiters' proposed findings; to prepare the final award, and to recover payment of the fees of the arbiters and of his own account for acting as clerk;[4] and where the submission has a time limit, to watch that it is duly and from time to time prorogated by the proper parties.[5]

For purely clerical work, it is thought that the clerk to an ordinary submission is entitled only to a *quantum meruit;* not to law agent's charges for meetings and correspondence.[6] It is perhaps hardly necessary to state that the clerk to an arbitration should be careful to preserve the strictest impartiality between the parties.[7]

[1] Birchall *v.* Bullough [1896], 1 Q.B. 325; see also Coolgardie Goldfields, Limited [1900], 1 Ch. 475.

[2] *Supra*, p. 28.

[3] For forms of orders, see *supra*, pp. 43, 45, and 47.

[4] Jackson *v.* Galloway, 5 S.L.R. 130. In this case it was held that the clerk was entitled to recover the amount of his account although the referee died before his award was taken up by the parties.

[5] *Supra*, p. 35.

[6] *Supra*, p. 28.

[7] As to the position of the clerk in a submission under the Lands Clauses Act, see Burnet *v.* Henry, 5 M. 96.

CHAPTER IV.

AWARDS OR DECREES-ARBITRAL.

As the jurisdiction possessed by arbiters is derived solely from contract, the arbiters cannot in their award go beyond the limits of the contract.[1]

Arbiters must keep strictly to the subject-matter of the submission, and are not entitled to take into account such pleas as compensation or retention arising between the parties to the submission, but outside its limits.[2]

The award should contain a narrative sufficiently full to show that the arbiters have given the parties ample opportunity of arguing their case before them, and of leading proof in cases where proof may have been appropriate. An award does not require any special form of words, but if separate matters have been referred in the submission, there should be distinct findings and decernitures applicable to each, for an award may stand in some parts, though it be reduced in others.[3]

Further, the award should distinctly bear whether it is interim or final, and should contain careful decernitures as to the expenses of the successful party when these have been awarded, and as to the account of the clerk to the submission and the arbiters' fees where these may be competently decerned for.

Where the submission itself contains a consent to the registration of the award for preservation and execution a like consent may be inserted in the award itself.

[1] Erskine, 4, 3, 32.

[2] M'Ewan *v.* Middleton, 5 M. 159; Wilson *v.* Porter, 17 S.L.R. 675. As to the power of arbiters to order specific things to be done in the course of the arbitration, see *supra*, p. 44.

[3] *Post.* p. 67.

Where the award is pronounced by an oversman, the date and circumstances of the devolution should be stated, and it should be clearly set out whether the whole or only a part of the subject-matter of the submission has been devolved upon him.[1]

It was at one time held in Scotland that an award did not require to be tested. "This being a decree," says Mr. Dallas, "I know no reason why there should be witnesses to the judge's subscription, or that by whom they are written should be mentioned, as in other papers which the law appoints; but, being customary to observe it, it is no error."[2]

It is, however, now settled law that an award, when executed in Scotland upon a probative submission, also executed there, is not valid unless it is itself probative.[3]

There are the following exceptions to this proposition :—

(*a.*) A holograph decree-arbitral.[4]

(*b.*) The report of a judicial referee.[5]

(*c.*) An opinion of counsel.[6]

(*d.*) An award pronounced in a Scotch submission by an arbiter resident in England, which, though not probative in Scotland, is yet sufficiently authenticated by the law of England.[7] The ground taken by most of the Judges in Lord Hopetoun's case was that the award should stand as valid *secundum legem loci actus;* but Lord Deas proceeded on the ground that all formalities in an award may be dispensed with by the consent of parties, express or implied, and that in the case before them such dispensation was to be implied.

[1] Moveable Rights, p. 243.

[2] Styles, p. 819.

[3] Short *v.* Habkin, 3d July 1711, M. 16,867; Percy *v.* Meikle, F.C. 25th Nov. 1808; Earl of Hopetoun *v.* Scots Mines Co., 18 D. at p. 764 (Whole Court case).

[4] Williamson *v.* Williamson, M. 16,933.

[5] Lord Deas in Earl of Hopetoun, *supra*, at p. 752.

[6] Fraser *v.* Lovat, 7 Bell's App. 171.

[7] Earl of Hopetoun, *supra*.

(*e.*) An informal award pronounced on a submission *in re mercatoria* constituted by informal letters, and not by formal deed of submission.[1] In Dykes' case Lord Neaves stated the ground of this exception thus:—"It is a recognised general rule that according to the nature of the reference may be the nature and form of the award."

(*f.*) A valuation of goods, or the like.[2]

The following are specimens of a complete award and of findings in various circumstances:—

Award by the Oversman in a Reference under a Contract for the Construction of Buildings.

"I, A. B., considering that by a contract dated , entered into between C. and D. for the erection by the said D. of a dwelling-house, &c., the said D. was to execute the works described in the specification thereto annexed, and in the plans and drawings therein referred to, and provision was made with respect to additions to and omissions from the said intended works; and it was provided that any disputes with respect to what should be deemed additional or omitted work, and the value thereof, should be referred to the architect of the works and another architect to be nominated by the said D.; and in case of the said arbiters not agreeing, then to the decision of an oversman, who should be an architect, and chosen by the said arbiters before entering upon the consideration of the matters in dispute: And whereas disputes arose between the said C. and D. as to what should be deemed additional and omitted work within the meaning of the said contract, and such disputes have been referred to the arbitration of E., the architect of said works, and to F., an architect appointed by the said D.: And whereas the said arbiters having finally disagreed and differed in opinion, did by minute of devolution dated

[1] Dykes *v.* Roy, 7 M. 357; M'Lellan *v.* Macleod, 4 W. & S. 157; Hutton *v.* Adams, 8 S. 591; Steel *v.* Swan, 6 S.L.R. 387; Hope *v.* Crookston, 17 R. 868.

[2] Robertson *v.* Boyd and Winans, 12 R. 419, per Lord Young, at p. 430.

devolve the said arbitration on me: Therefore, being well and ripely advised in the said matters, I do hereby give forth and pronounce my final award as follows, that is to say—I find that the work described in the first column of the first list hereto is additional work within the meaning of the said contract; and I find the value of said additional work to be the respective sums set opposite thereto in the second column of the said first list; and I find that the work described in the first column of the second list hereto is omitted work within the meaning of said contract; and I find the value of the said omitted work to be the respective sums set opposite thereto in the second column of the said second list; and which sums for additional work and omitted work amount *in cumulo* to the respective sums of £ and £ , and which sums being set off against each other *pro tanto* leaves a balance due by the said C. to the said D. of £ ; and for this sum I hereby decern the said C. to make payment to the said D., with interest thereof at the rate of five per centum per annum from the day of , being the date when the said contract work was completed: Further, I find the said C. liable in payment to the said D. of the whole expenses of the reference and incident thereto: And I do award the amount of expenses incurred to the said D. at the sum at which the same shall be taxed by the Auditor of the Court of Session, to whom I hereby remit the account thereof for that purpose: And I ordain the said C. to make payment of the said expenses, taxed as aforesaid, to the said D.: And I do further award the amount of the account of expenses incurred to X. as clerk and legal assessor in the reference at the sum at which the same shall be taxed also by the Auditor of the Court of Session, to whom I hereby remit the account thereof for that purpose: And I ordain the said C. to make payment of the said taxed amount of said account to the said X.: And I decern and ordain both parties to implement this award (if the award is not a final decree-arbitral, say "this interim award") each to the other.—In witness whereof."[1]

[1] In a submission such as this the proper course would probably be to find

Award of Damages for non-performance of Agreement.

"I award that the claimant has sustained damages by reason of the non-performance by the respondent of the agreement to the amount of £ ;

OR,

"I assess the damages sustained by the claimant at the sum of £ ; and I decern the respondent to pay to the claimant on or before the day of the sum of £ ."

Award of Sum in full of all demands.

"I award that the said A. shall pay to the said B. the sum of £ in full satisfaction of all claims and demands whatsoever relative to the matters referred to me; and I decern the said A. to make payment of said sum to the said B."

Award of Mutual Discharges.

"And I further award that the said A. and B. shall each, on the written request of the other of them, such other having first implemented the award, and at the expense of the party requiring the same, executed and deliver unto the other of them a discharge of all claims and demands in respect of the matters referred to me."

Award of Discharge by one Party.

"And I further award that upon payment of the sum awarded by me as aforesaid the said A. shall, if required by and at the expense of the said B., execute and deliver to him the said B. a discharge of all claims and demands in respect of the matters referred to me."[1]

neither party entitled to expenses, but the finding for expenses is inserted in the form in case circumstances exist which warrant these being awarded.

[1] In preparing these forms help has been derived from 1 Key and Elphinstone, p. 173 *et seq.* Forms of award are also to be found in Bell, p. 425 ;

Stamp Duty on Awards.

The following is the portion of the schedule of the Stamp Act, 1891, relating to the stamping of awards:—

Award in England or Ireland, and Award or Decreet-Arbitral in Scotland.

In any case in which an amount or value is the matter in dispute—								
Where no amount is awarded, or the amount or value awarded does not exceed £5,							£0	0	3
Where the amount or value awarded—									
Exceeds £5 and does not exceed £10,							0	0	6
,, 10	,,	20,					0	1	0
,, 20	,,	30,					0	1	6
,, 30	,,	40,					0	2	0
,, 40	,,	50,					0	2	6
,, 50	,,	100,					0	5	0
,, 100	,,	200,					0	10	0
,, 200	,,	500,					0	15	0
,, 500	,,	750,					1	0	0
,, 750	,,	1000,					1	5	0
,, 1000,							1	15	0
In any other case,							1	15	0

Delivery of Awards.

The award must be complete and ready for delivery before the time fixed for the duration of the submission has expired. But the arbiters are not bound actually to deliver the decree-arbitral to the party in whose favour it has been pronounced until the expenses found due to the clerk to the reference and the remuneration to themselves (where they are entitled to such remuneration) have been paid.

The decisions on this point are as follows. In the case of Lang *v.* Brown[1] an arbiter during the subsistence of the submission had made notes of his proposed findings, and had instructed the clerk to prepare an award in conformity therewith, but the award

Moveable Rights, p. 239 *et seq.*; Russell, p. 411 *et seq.* A form of award in a submission under the Lands Clauses Act is given *post.* p. 104.

[1] Lang *v.* Brown, 15 D. 38 (Whole Court case). Reversed, but on another point, 2 Macq. 93.

was not signed until after the submission had expired. It was held by a majority of the whole Court that the award was null.

In an earlier case two interim awards had been handed by the arbiters to the clerk to the submission, with instructions to deliver copies to the parties. It was held that these awards were not delivered, and that, as the submission had terminated without any final judgment, and the awards had never been delivered or recorded, they were null.[1]

In the case of M'Quaker *v.* Phœnix Assurance Company[2] a submission provided that the arbiters "shall issue their final award, or, in the event of their differing in opinion, they shall execute a minute of devolution upon the oversman named by them as above written, within ten days, in either event, from the date of their accepting this submission." The submission was accepted on 11th June; the award was signed on 18th and 20th June. The second date was accounted for by the absence of one of the arbiters in Inverness-shire. On the 19th the clerk to the submission intimated to one of the parties that the arbiters had made their final decision. The award, however, did not reach the clerk till the 22d. In these circumstances the Court held the award binding, Lord Deas laying down the principle that there is a presumption when the award is signed and in the hands of the clerk, and the time for issuing it has expired, that it was intended to be binding.

It is difficult to reconcile the case of M'Quaker with that of Gray. But apparently the Court will not hold a final award to be too late if it is in fact adjusted before the close of the submission, although the actual signing of it may be accidentally delayed. It is not decided whether, after handing it to the clerk to the reference for delivery to the parties, a judicial referee has power to recal his report and alter the findings.[3]

[1] Gray *v.* M'Nair, 5 W. & S. 305. This was an arbitration as to the working of minerals.

[2] M'Quaker *v.* Phœnix Assurance Co., 21 D. 794.

[3] Macrae *v.* Edinburgh Street Tramways Co., 13 R. 265; and see Jackson *v.* Galloway, 5 S.L.R. 130 (Lord Ardmillan).

In England, when the submission has provided that the award shall be ready by a certain day, the award is valid if ready for delivery by the appointed day.

But if the submission directs that the award is to be delivered to the parties by a certain day, it is invalid unless actually delivered by that day.

"In general, however, the arbitrator's duty is only to have the award ready for delivery to the parties on their request before the period of his authority has expired; the delivery itself may take place at any time."[1]

Reduction of Awards.

While it is competent in an action for implement of an arbiter's award to inquire whether his actings have been *ultra fines compromissi*, averments of partiality founding a plea of corruption cannot be made except in an action for reduction of the award.[2]

So long as an arbiter keeps within the limits of the submission, his award cannot be reduced on account of error in judgment or mistake in law. In the words of Lord Jeffrey in the case of Mitchell *v.* Cable,—"On every matter touching the merits of the case the judgment of the arbiter is beyond our control and beyond question of cavil. He may believe what nobody else believes, and he may disbelieve what all the world believes. He may overlook or flagrantly misapply the most ordinary principles of law, and there is no appeal for those who have chosen to submit themselves to his despotic power."[3]

The law of England on this point has been thus summarised:—". . . The modern cases clearly establish that the Courts will not send back an award to the arbitrator on the mere ground of mistake. But where there has been corruption

[1] Russell, p. 251.

[2] Thomson *v.* Munro, 19 S.L.R. 739.

[3] Mitchell *v.* Cable, 10 D. 1297, at p. 1309; *cf.* Lord Watson in Caledonian Railway Co. *v.* Turcan, 25 R. (H.L.) 7, at p. 17. Misconduct of arbiters outside the submission is dealt with *supra*, p. 39.

or fraud, where there is a mistake of law or fact apparent on the face of the award, or where the arbitrator himself admits that he has made a mistake, the award will be set aside or remitted to the arbitrator." [1]

The Arbitration Act, 1889 (which applies to England only), provides, section 7—"The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power . . . (*c*) to correct in an award any clerical mistake or error arising from any accidental slip or omission."

While it has always been competent to attack an award at common law,[2] most actions of reduction of awards during the last two hundred years have been laid on the 25th of the "Articles of Regulation concerning the Session, dated the 29th of April 1695."

The Articles of Regulation have all the force of an Act of Parliament, although it cannot be said that they were enacted by Parliament itself. They were passed by the Court of Session under a Royal Commission granted by King William the Third in the year 1693 for the Regulation of Judicatories. In 1695 the King approved of the Articles, and ordained them to have full force, strength, and effect.

The 25th Article is as follows:—"*Item*, That for the cutting off of groundless and expensive pleas and processes in time coming, the Lords of Session sustain no reduction of any decreet-arbitral that shall be pronounced hereafter upon a subscribed submission at the instance of either of the parties submitters upon any cause or reason whatsoever, unless that of corruption, bribery, or falsehood, to be alleged against the judges arbitrators who pronounced the same."

Lord Chancellor Eldon, in the case of Sharpe *v.* Bickerdyke,[3] used the well-known words:—"By the great principle of eternal justice, which was prior to all these Acts of Sederunt, regulations, and proceedings of Court, it is impossible that an award can stand

[1] Russell, p. 198.
[2] Miller *v.* Millar, 17 D. 689 (per Lord Deas, at p. 719).
[3] Sharpe *v.* Bickerdyke, 3 Dow, 102.

where the arbitrator heard one party and refused to hear the other." With reference to this expression about the Act of Regulation, viz.—"All these Acts of Sederunt, regulations, and proceedings of Court," Lord Ivory remarked that Lord Chancellor Eldon fell into the grievous mistake of thinking that the Act of Regulation was a mere Act of Sederunt or Rule of Court, in place of having the force of a Statute.[1]

Lord Deas, however, in the same case[2] expressed a doubt whether the Commissioners who framed the Act of Regulation had not exceeded their powers, although he admitted that a challenge of the Act on that ground was then too late.

Since then the Act of Regulation has been repeatedly held to have the force of a Statute. This was so laid down by Lord Watson in the House of Lords in the recent case of Adams *v.* Great North of Scotland Railway.[3]

It has, however, always been competent to bring an action for the reduction of an award at common law.

In the case of Calder *v.* Gordon[4] it was decided that an award could be reduced where the Court was satisfied that the arbiter was misled by the underhand proceedings of one of the parties. Here the agent of one of the parties induced the arbiter to pronounce the award by misrepresentation, and by unfairly suppressing the fact that a compromise had been proposed by the agent of the other party. This, it will be observed, was a case of misconduct of one of the parties, and not of the misconduct of the arbiter.

In the case of Logan *v.* Lang[5] the price to be paid for certain lands was referred to arbitration. The seller founded upon an offer which he had obtained for a lease for nineteen years of the lands as a bleach-field at a higher rent than the lands were worth by falsely representing to the intending tenant that they possessed

[1] Miller *v.* Millar, 17 D. 689, at p. 726.
[2] *Ibid.*, p. 729.
[3] Adams *v.* Great North of Scotland Railway Co., 18 R. (H.L.) 1.
[4] Calder *v.* Gordon, 15 S. 463.
[5] Logan *v.* Lang, F.C. 15th Nov. 1798.

the command of a certain supply of water. And the arbiter in his award specially relied on this offer. The Court reduced the award at common law, repelling pleas that the award was unimpeachable by the Act of Regulation, and further, that it could not be impeached on grounds outside that Act. This case of Logan is referred to in Lord Justice-Clerk Hope's judgment in the case of Miller *v.* Millar.[1] This also was a case of misconduct, not by the arbiters, but by one of the parties.

In the case of M'Pherson *v.* Ross[2] the following issues were approved by the Court:—"Whether by fraud and deceit practised by the defender the said oversman was induced to pronounce the decree-arbitral;" "whether the said oversman wrongfully pronounced the decree-arbitral without hearing the parties in the matter submitted." In the second issue the Court also refused to substitute the word "corruptly" for "wrongfully." This also was a case of misconduct by one of the parties.

Since the case of Adams *v.* Great North of Scotland Railway,[3] it is clearly competent to challenge an award at common law on account of the misconduct of the arbiters.

The case of Mitchell *v.* Cable[4] is a leading authority on the subject of reduction under the Act of Regulation, and specially on the construction of the word "corruption" used in that Act. In this case there was a dispute between a shipowner and ship captain. Evidence was led in Glasgow, and the arbiter granted a commission to lead evidence in Bombay. The commission miscarried. The arbiter declined to renew the commission, and the award was reduced by the Court.

Lord Mackenzie said: "But it is impossible to construe the word 'corruption' strictly when stated as a ground of reduction of decrees-arbitral. It does not mean bribery, for that is expressly mentioned as a separate ground for reduction of such decrees.

[1] Miller *v.* Millar, 17 D. 689, at p. 713.

[2] Macpherson *v.* Ross, 9 S. 797.

[3] Adams *v.* Great North of Scotland Railway Co., 16 R. 843; affirmed, 18 R. (H.L.) 1.

[4] Mitchell *v.* Cable, 10 D. 1297.

We cannot stop short of holding that it includes any plain failure in duty distinct from an error of judgment. We are not entitled to set aside the award of an arbiter pronounced under an error of judgment, however palpable that error may be; but if any failure in duty has been committed distinct from an error of judgment, the award cannot stand; that failure must be included under the term 'corruption.' Now here, I think, there was something more than an error in judgment,—there was misconduct on the part of the arbiter."

Lord Fullerton said: "All decisions on the merits of the claims of the parties are of course final and unchallengeable by our law. And even determinations on the procedure by which the arbiter's knowledge of the merits is to be obtained are in the general case within his competency. But, in this last matter, there is this limit to his powers, viz., that he shall do strictly equal justice between the parties—that he shall not allow to the one that which he denies to the other. For the condition of the equal footing on which the parties stand, and of their equal rights to inform the arbiter's mind, seems to me a necessary implication in the whole transaction. . . . If he hears one party he cannot refuse to hear another."

Lord Jeffrey said: "I am unable to recognise any clear line of demarcation between his (the arbiter's) control over the mode of procedure and his powers on the merits of the cause. At all events, he has in reference to the mode of procedure also a very large province. . . . Nor can I quite take up the distinction of Lord Mackenzie, that if he commits a mere error in judgment he cannot be set right, because, alas, in many cases the fatal error of the arbiter is an error in judgment. But the true principle is that his decree-arbitral can stand only when he has done his duty *fairly*. I do not mean *fairly* in reference to his moral dispositions, but he is bound to show this Supreme Court that he has dealt *fairly*, that is *equally*, with both parties. Otherwise it must be held that he violated the contract of submission and acted *ultra vires compromissi*."

Lord Watson, in the case of Adams, referred to Mitchell *v.* Cable "as perhaps the leading case in the Court below on this branch of the law."[1]

In the case of Miller *v.* Millar[2] the circumstances were as follows:—The consignees of a cargo having discovered that part thereof was damaged, complained to the shipowner. A survey was made by two shipmasters, who reported that the damage was occasioned by improper dunnaging (that is, lining of the hold of the ship), for which the owner was liable. A second survey was obtained by the master, under judicial sanction, to the effect that the damage was not so occasioned. The consignees refused to be parties to this survey. The consignees and owner referred the dispute to an arbiter, with power to take evidence as to the cause and amount of damage. The arbiter appointed both the surveyors who had conducted the first survey, as well as a third party, to be examined. One of the surveyors had declared by letter addressed to the owner of the ship that the report of the survey was merely intended by him as an expression of opinion. From absence at sea it was found impossible to examine him before the arbiter. After failure of this attempt to examine him, the arbiter refused to allow a further opportunity for doing so, declaring himself satisfied that the first report was correct, and pronounced decree.

A majority of the whole Court held it unnecessary to the reduction of an award that there should be moral corruption or any moral wrong, or wilful dishonest motive or purpose on the part of the arbiter, and that an award is reducible where there has been a refusal of proof such as to lead to injustice. In the particular case, however, the award was sustained.

In the case of Cameron *v.* Menzies,[3] Lord Neaves gave the following definition of "corruption": "Some pravity of the mind, some perversion of the moral feeling, either by interest or passion, or partiality between the two parties, some unfairness which disturbs the balance, which the judge should keep in his mind."

[1] Adams *v.* Great North of Scotland Railway Co., 18 R. (H.L.) 1, at p. 9.
[2] Miller *v.* Millar, 17 D. 689.
[3] Cameron *v.* Menzies, 6 M. 279.

In the case of Alexander *v.* Bridge of Allan Water Company,[1] it was held to be "legal corruption" in the sense of the Act of Regulation that the arbiter had declined to entertain a claim which he had no power to reject. The reference was a statutory one, and the arbiter refused to put a value upon certain water rights on the ground that the claimant had not a proper title thereto.

In the case of Adams[2] strong views were expressed in the House of Lords against the ground of decision in Alexander's case. Objection was taken in particular to the use of such phrases as "constructive corruption."

Lord Watson says:[3] "It has been recognised by the Court of Session, and also by noble Lords in this House, that the Regulation was never intended to go beyond the point of putting an end to the practice of review upon the merits, and of placing the award of an arbiter selected by the parties for the determination of all questions between them on precisely the same footing as the decree of a Judge Ordinary, to whose decisions finality has been attached by statute. Accordingly, both in this House and in the Court of Session, awards have been set aside upon other grounds which did not necessarily involve an investigation of the merits of the case. Want of jurisdiction is not covered by it; it is not one of the pleas which are forbidden, and an award may still be set aside on that account. Misconduct in the course of the case, whether in the proceedings which led to the award or in the award itself, is another ground with which the Regulation was never intended to deal. I think I state the law correctly when I say that it will be a good ground of reduction at the instance of either party if he is able to show, independently of the Regulation, either that the arbiter has exceeded what are called in Scotland the *fines compromissi*, or that in the course of the arbitration he has disregarded any one of the express conditions contained in the contract of submission, or

[1] Alexander *v.* Bridge of Allan Water Co., 7 M. 492.
[2] Adams *v.* Great North of Scotland Railway Co., *supra*, 18 R. (H.L.) 1.
[3] *Ibid.* at p. 8.

any one of those important conditions which the law implies in every submission. The case of Sharpe in 1817,[1] to which I alluded in the course of the argument, is a good illustration of that. Lord Eldon there refused to recognise an award as valid where the arbiter was perfectly honest, free from corruption, free from bribery, and free from falsehood, but had proceeded upon an honest error, believing that he had a joint representation from both the parties to the submission, whereas it was a representation from one only. And so in those cases where an act innocently committed by the arbiter amounts to misconduct which, in the opinion of the Court, would naturally imply that justice had not been done between the parties, the award must be set aside, not according to the Regulation, but according to those principles of law which existed before the Regulation, and which were not in the least affected by it."

In the later case of the Holmes Oil Company,[2] Lord Watson said: "I think that in so far as regards the conduct of the case, and in so far as regards the jurisdiction of the arbiter to dispose of the case, the Regulations of 1695 make no provision whatever. These rest upon the common law."

The arbiter must confine himself to the jurisdiction which the parties have conferred upon him, and in the conduct of the arbitration before it comes to final judgment, he is bound to observe any condition which the parties may have chosen to impose upon him by the deed of submission, and he must also conform to all those rules for securing the proper administration of justice, which the law implies in the case of every proceeding before an arbiter as well as in the case of every proceeding before a Court of Justice.

A result of the decisions of the House of Lords in the cases of Adams and the Holmes Oil Company will be to discourage the laying of actions of reduction of awards on the ground of "legal corruption" or "constructive corruption" under the Act of Regulation, and the substitution therefor of one or other of the common law grounds of (1) unfairness on the part of the arbiter in the

[1] Sharpe *v.* Bickerdyke, 3 Dow, 102.
[2] Holmes Oil Co. *v.* Pumpherston Oil Co., 18 R. (H.L.) 52.

conduct of the submission—in short, misconduct on his part, whether by acts of omission or commission; or (2) that he has gone *ultra fines compromissi*.[1] Proof of the arbiter's misconduct must be sought for in the externals of the arbitration proceedings. In the internals of the submission—that is, in what is transacted in the arbiter's own mind—he will still be a final judge, not subject to the review of any Court of Law. On the merits of the submission he will still be supreme, and there will be no appeal against his award.

An action for reduction of an award will usually be disposed of by proof before a judge, not by a jury.[2]

A decree-arbitral which is proved to be merely a form adopted for embodying an agreement between the parties is reducible as being an agreement and not truly an award.[3]

An award may be challenged on the ground that it does not exhaust the subject-matter of the arbitration.[4] But where one of the parties to an arbitration is the sole claimant and the award has been given on part only of his claim, it is not an objection to the award that it does not deal with the other part of the claim.[5] Further, when a submission bears to be of "all claims, disputes, questions, and differences presently depending and subsisting between" the parties, the submission will not be held to be unexhausted simply because a possible claim has not been brought before the arbiter.[6]

In the case of Paterson *v.* Corporation of Glasgow, decided 17th July 1900, but not yet reported, the award of an arbiter on a claim for extras in the execution of a contract for the construction of certain works was challenged on various grounds, *inter alia*—

[1] Traill *v.* Coghill, 22 S.L.R. 616.

[2] Thomson *v.* Munro, 20 S.L.R. 16.

[3] Maule *v.* Maule, 6 Pat. App. 449. The award in this case dealt with certain entail questions.

[4] Mitchell *v.* Brand, 1 S.L.R. 68, award reduced; Paul *v.* Henderson, 3 S.L.R. 246, award sustained (a previous stage of this case is reported in 5 M. 613, and 3 S.L.R. 179); Grant *v.* Squair, 6 S.L.R. 183.

[5] MacLellan *v.* MacLeod, 4 W. & S. 157.

[6] Perrens and Harrison *v.* Borrow, 6 S.L.R. 581.

(1) that the arbiter did not accurately ascertain the facts; (2) that he refused to allow the parties to be represented by their law agents at a proof which he allowed; (3) that he had awarded one lump sum, although there were two distinct submissions; and (4) that he had travelled beyond the limits of the submissions. The award was reduced.

Partial Reduction of Awards.

Where the parts of an award are articulate and separable, the award may be partly reduced and partly sustained.

The following are the most important cases of partial reduction:—

(*a.*) *Jack* v. *Cramond.* Here the Court "find that the award of the arbiters ascertaining twelve guineas as their own fees was illegal and *pessimi exempli,* and unwarranted by the submission, and therefore sustain the reasons of reduction as to that sum: . . And find that the award by the arbiters for the above sum as part of the expense of the submission is totally distinct from and unconnected with the matters submitted and determined by the decree-arbitral, and that the decree-arbitral may and ought to subsist in all its parts, notwithstanding the avoidance of what was so illegally awarded; and therefore repel the reasons of reduction of the decree-arbitral *quoad ultra.*"[1]

(*b.*) *Grosat* v. *Cuningham.* Here it was held that the penalty in the award could not be larger than the penalty allowed by the submission, and the award was reduced as regards the excess.[2]

(*c.*) *Adams* v. *Great North of Scotland Railway.* An arbiter

[1] Jack *v.* Cramond, M. App. Arbitration, No. 5; Montgomerie *v.* Strang, Lennox, and Co., M. 631; see also Duff *v.* Pirie, 21 R. 80. In this case, which, however, was not a case of partial reduction, the pursuer was held barred by having paid one-half of the arbiter's fee without challenge; and Johnston *v.* Cheape, 6 Pat. App. 339 and 342 (two cases).

[2] Grosat *v.* Cuningham, M. 626; Macilhose *v.* Gardener, 5 Brown Sup. 204.

had given decree for a larger sum in name of liquidate damages than was claimed by the party in whose favour the award was given. The award was reduced as regards the excess.[1]

(*d.*) *Kidd* v. *Paterson.* The arbiters gave decree for certain expenses which had been otherwise arranged in the submission. The Court reduced the award to that extent.[2]

(*e.*) *Cox* v. *Binning.* The arbiter in a reference as to a loss on certain goods ordained one of the parties to consign a sum of money. This was held to be *ultra vires*, and the award was to that extent reduced.[3]

(*f.*) *Traill* v. *Coghill.*—A landlord and tenant entered into a submission as to whether the landlord had failed to implement certain obligations incumbent on him by the lease, and if so, to fix what damage, if any, had been sustained by the tenant in consequence of such failure, and from time to time during the currency of the lease, or even after its termination, to fix the damage that might thereafter be sustained by the tenant. The oversman, on whom the submission had been devolved, *inter alia*, found the landlord liable to the tenant in certain annual sums payable from the date of entry and continuing during the currency of the lease in name of damages. The Court held these findings to be *ultra fines compromissi*, and to that extent reduced the award.[4]

There have been numerous cases in England where an award has been partially set aside. "The bad portion, however, must be clearly separable in its nature, in order that the award may be good for the residue."[5]

[1] Adams *v.* Great North of Scotland Railway Co., 16 R. 843. This case went to the House of Lords, but on another point.

[2] Kidd *v.* Paterson, F.C. 19th June 1810; Ferrier *v.* Alison, 5 D. 456; affirmed, 4 Bell's App. 161.

[3] Cox *v.* Binning, 6 M. 161.

[4] Traill *v.* Coghill, 22 S.L.R. 616.

[5] Russell, p. 201.

Ambiguity in Awards.

When an award is plainly ambiguous in its language, the Court will allow proof in order to explain the meaning of the terms used.

This was done in the case of Cuninghame *v.* Dunlop,[1] where difficulties arose in interpreting and applying an award which had found a proprietor entitled to a servitude of cutting reeds and rushes in a loch.

Reduction of an award on the ground that it is ambiguous will not readily be granted.[2]

In Lumsden's case the march between two Highland properties had been fixed by the award of a single arbiter. It was alleged to be ambiguous, but the Court refused reduction.

[1] Cuninghame *v.* Dunlop, 15 S. 295.

[2] Lumsden *v.* Gordon, 4 D. 1353 ; see also Patrick *v.* M'Call, 4 S.L.R. 12 ; Begbie's Trs. *v.* Thomson, 9 S.L.R. 156 ; Highland Railway Co. *v.* Great North of Scotland Railway Co., 23 R. (H.L.) 80.

CHAPTER V.

JUDICIAL REFERENCE.

A JUDICIAL reference is a submission entered into by parties at the sight of the Court. A judicial reference of a particular cause is a reference only of all the matters in dispute in that cause.[1] A judicial reference is usually made by a joint minute. There is no special style of minute. The minute of reference is signed either by the litigants or by counsel on their behalf.

The usual practice is for the authority of the Court to be interponed to the minute and the case remitted to the referee. The interlocutor of Court approving of the minute is usually in the following terms:—"The Lord Ordinary interpones authority to the minute of reference for the parties, No. of process, and in terms thereof remits the process to A. B. as judicial referee therein: Grants warrant to the said referee to take such probation as the justice of the case may require, grants diligence against witnesses and havers," &c.[2]

A judicial reference may, however, be constituted without an interlocutor if the case is submitted to the referee by joint minute signed by the parties in presence of the Court, and the parties appear before the referee.[3]

In the case of Gilfillan *v.* Brown,[4] the jury had been sworn, but counsel for the parties agreed that neither side should insist on a verdict, and further agreed to a judicial reference of the question whether the defenders should pay any expenses to the pursuer.

[1] Per Lord Brougham in Edinburgh Oil Gaslight Co. *v.* Clyne's Trustees, 2 S. & M'L. 243.

[2] Bell, p. 421.

[3] Fairley *v.* M'Gown, 14 S. 470.

[4] Gilfillan *v.* Brown, 11 S. 548.

The Court held that at that stage of the proceedings it was within the powers of counsel to enter into such a reference.

A judicial reference cannot be recalled by the Court after it has interponed its authority thereto.[1]

In its essential features a judicial reference is in the same position as an ordinary submission. In the words of Lord Moncreiff it is an "established rule and essential principle of the law of Scotland, that when an award in a judicial reference is clear in its terms, correct in its form, embracing nothing which was not referred, and exhausting all that was referred, it is not competent for this Court to review such an award on its general merits, or to set it aside or refuse effect to it on any idea of mere error in judgment in the matters properly within the cognisance of the referee."[2]

A judicial referee is sole judge both of the law and of the fact of the matters referred.[3]

The award of a judicial referee is protected in the same way as the award of an ordinary arbiter by the Act of Regulation against reduction on the ground of iniquity.[4]

The Court will not remit to a judicial referee to give the reason of his award.[5]

In a judicial reference the parties may from time to time come to the Court and get irregularities in the procedure of the referee corrected, and in this respect a judicial reference differs from an ordinary submission.[6]

In Lyle's case the parties had not been heard before the award was pronounced. The Court remitted to the referee to give them an opportunity of being heard before him. A similar remit was

[1] Walker *v.* Shaw Stewart, 2 Macq. 424.

[2] Mackenzie *v.* Girvan, 3 D. 318, per Lord Moncreiff, at p. 328; 2 Bell's App. 43. In the earlier case of Edinburgh Oil Gaslight Co. *v.* Clyne's Trs., *supra*, the House of Lords remitted back to the Court of Session to set aside the award of the judicial referee. Watmore *v.* Burns, 4 D. 150; Brakinrig *v.* Menzies, 4 D. 274.

[3] Mackenzie *v.* Girvan, *supra*, at p. 329.

[4] *Ibid.*

[5] Rogerson *v.* Rogerson, 12 R. 583.

[6] Welch *v.* Jackson, 3 M. 303.

made in Hilton's case, where the referee had reserved the question of expenses without hearing the parties thereon.[1]

In the case of Baxter *v.* Macarthur the Court remitted to the judicial referee to rehear the parties, because fifteen months had elapsed between the hearing and the issue of the award, and the arbiter had also failed to issue notes of his proposed findings.[2]

Where the award of a judicial referee is ambiguous, the Court may remit back to the referee for an explanation.[3] The remit in Anderson's case was by consent of parties.

In the case of Low *v.* Banks[4] one of the parties alleged that the judicial referee had agreed to receive certain evidence, but had issued his award without doing so. The referee and his clerk were examined. The Court held that the allegations had not been proved.

Where the report of a judicial referee bears that he has heard the parties, the Court will usually assume that he has heard them on all points of the case.[5]

A judicial referee has considerable discretion as to the method of taking proof, and the extent thereof, and the manner in which he will hear parties.[6]

The question has been discussed (but not decided) whether, when the report of a judicial referee has been placed by him in the hands of the clerk to the reference for delivery to the parties, the referee has power to recal it and alter the findings therein.[7]

A judicial reference falls along with the process in which it has been made. Thus, where an action stood dismissed under the Sheriff Court Act (16 and 17 Vict., c. 80, sect. 15) by the lapse of six months from the date of the last interlocutor, it was held that

[1] Lyle *v.* Neilson, 6 D. 1163; Hilton *v.* Walkers, 5 M. 969.

[2] Baxter *v.* Macarthur, 14 S. 549; Shiels *v.* Shiels' Trs., 1 R. 502.

[3] Anderson *v.* Pott, 10 S. 534 and 11 S. 778.

[4] Low *v.* Banks, 14 S. 869.

[5] Robertson *v.* Davidson, 11 S. 659.

[6] Colquhoun *v.* Haig, 3 S. 424; Flounders *v.* Flounders, 4 S. 459.

[7] Macrae *v.* Edinburgh Street Tramways Co., 13 R. 265, *supra*, p. 58. As to the claim of the clerk to a judicial reference for his account when the referee had died before issue of his award, see Jackson *v.* Galloway, 5 S.L.R. 130.

an award by the judicial referee of earlier date could not be enforced.[1]

When a case is referred to a judicial referee without special mention of the expenses of the action, the judicial referee has power to deal with them.[2] It has been held that where a judicial referee was specially empowered to order the losing party to pay all costs, he was entitled, when a nominal sum was found due to one party, to hold him nevertheless to be the losing party and liable in the whole expenses.[3]

Where a judicial referee inserted in his award a reservation of claims which were outside the reference, and which the Court were of opinion would have reserved themselves, the Court repelled the objection that the reference had not been exhausted.[4]

The differences between a judicial reference and an ordinary submission are—(1.) The reference is constituted by a minute lodged in the process, with the consent of the Court interponed thereto: (2.) The award is an improbative document in the shape of a report to the Court signed by the referee, to which authority of the Court is then interponed: (3.) The Court during the subsistence of the reference has a certain power of guiding and controlling the proceedings of the judicial referee.

In the case of Welch *v.* Jackson Lord Deas remarked: "I do not by any means say that in a judicial reference there is the same complete absence of control as in an ordinary submission."[5]

[1] Gillon *v.* Simpson, 21 D. 243.

[2] Fairley *v* M'Gown, 14 S. 470.

[3] Gye *v.* Hallam, 12 S. 311; affirmed, 1 S. & M'L. 747. The order of the House of Lords was framed in special terms to secure that the case "might not be drawn into a precedent."

[4] Edinburgh Oil Gaslight Co. *v.* Clyne's Trustees, 10 S. 723, 2 S. & M'L 243.

[5] Welch *v.* Jackson, 3 M. 303, at p. 306.

CHAPTER VI.

MISCELLANEOUS POINTS.

THE word "arbitrator" was of old used in Scotland as synonymous with the word "arbiter." The expression "arbitrator" occurs in the 25th article of the Act of Regulation. In Dallas' Styles[1] is given a form of submission to "Sir John Cunninghame of Lamburghtoun, Advocate, as judge arbitrator and amicable compositor[2] neutrally and mutually elected, nominat, and chosen by both parties."

For a long period, however, the word "arbiter" has been used in Scotland in place of "arbitrator." The latter word is invariably used in England. In England, too, the oversman is always called the umpire.[3]

A distinction has been drawn in some Scotch cases between an "arbiter" and an "arbitrator." An "arbitrator" has been defined as "a man of skill employed by the parties to make a contract for them."[4]

The distinction between arbiters to decide a *lis* and arbitrators

[1] P. 813.

[2] The phrase "amiables compositeurs" occurs in the Code of Civil Procedure of Lower Canada. Article 1346 of that Code is as follows: "Arbitrators must hear the parties and their respective proofs or establish default against them, and decide according to the rules of law, unless they are dispensed from doing so by the terms of the submission, or unless they have been appointed as "amiables compositeurs."—See Rolland *v.* Cassidy, L.R. 13, A.C. 770.

[3] The words oversman and umpire are not only legally synonymous, but by derivation have substantially the same meaning. Umpire was originally spelt "numpire" and is derived from *non* and *peer*—not an equal. The umpire is the odd man, the third man called in to settle a dispute between two others—the oversman.

[4] Henderson *v.* Paul, 5 M. 628, per Lord Neaves, p. 633.

to make a bargain, fix a price, or value the subject of a contract is still recognised for some purposes.[1]

It has, however, been decided that the award of such an arbitrator is protected by the Act of Regulation from reduction on the ground of iniquity, just as any other award of arbiters is guarded.[2] Practically, therefore, "arbitrator" and "arbiter" are synonymous.

In England an important distinction is drawn between a valuer or valuator and an arbitrator. It is held that to make an arbitration there must be a matter in dispute between the parties,[3] therefore a valuer is not an arbitrator, and that his decision is not an award.

In the words of Lord Esher, M.R.:[4] "If a man is, on account of his skill in such matters, appointed to make a valuation in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge, and his skill, he is not acting judicially,—he is using the skill of a valuer, not of a judge. In the same way, if two persons are appointed for a similar purpose, they are not arbitrators, but only valuers. They have to determine the matter by using solely their own eyes and knowledge and skill."

In the case of *In re* Carus-Wilson[5] Lord-Justice Lindley observed: "A valuer may be in one sense called an arbitrator, but not in the proper legal sense of the term. In the ordinary cases of arbitration there is a dispute which is referred. The object of the valuation, on the other hand, is to avoid disputes."

The appointment of a valuer in the above sense is accordingly not a "submission" within the meaning of the Arbitration Act, 1889, for "submission" is by section 27 defined to be "a written agreement to submit present or future disputes to arbitration, whether an arbiter is named therein or not."[6]

[1] Calder *v.* Mackay, 22 D. 741.
[2] Morrison *v.* Aberdeen Market Co., 9 D. 910.
[3] Collins *v.* Collins, 28 L.J. Ch. 184, Lord Romilly, M.R., at p. 186.
[4] Dawdy *v.* Hartcup, L.R. 15 Q.B.D. 426.
[5] Carus-Wilson *v.* Greene, L.R. 18 Q.B.D. 7.
[6] On this matter see also Russell, pp. 37 and 159, and Hudson, p. 530 *et seq.*

One of the parties to a submission can, while it is pending, assign his interest therein, with power to the assignee to obtain the award in his own favour.[1]

There have been several cases under the arbitration clause usually contained in articles of roup of heritable property :—

(1.) The articles contained a clause referring any difference which should arise between the exposer and the purchaser "concerning the import of these articles or the implement thereof." It was held by a majority of the Court that this submission clause applied to a dispute between the seller and purchaser as to whether the price had been raised by a "white bonnet."[2]

(2.) The clause in the articles was as "to the intent and meaning thereof." Under this clause it was held by two Judges of the First Division (*diss.* Lord Fullerton), reversing the judgment of Lord Robertson, that a question whether the seller had a vested right in the subjects exposed fell under the submission.[3]

(3.) The clause was of all disputes "relating to the premises." The purchaser refused to grant a bond for the price or deposit the same in the joint names of himself and the exposer, and raised an action for implement of the contract of sale. The Court sustained the exposer's first plea in law, that the action was excluded by the submission contained in the articles of roup.[4]

Everything can be submitted to arbitration that can competently be made the subject of a direct agreement. Certain matters, such as those of domicile, marriage, legitimacy, and indeed all questions of *status*, cannot competently be made the subject of an arbitration, for parties cannot legally settle such questions by agreement.

[1] Henry *v.* Hepburn and Burns, 13 S. 361.
[2] Ewing *v.* Laurie, F.C. 13th Jan. 1825.
[3] Watt *v.* Shaw, 11 D. 970.
[4] Turnbull *v.* M'Bride, 20 D. 514.

The patrimonial consequences of such matters can, however, be submitted.

In the case of the Earl of Kintore *v.* Union Bank[1] there was a deed of accession relative to a trust-deed for creditors which contained a clause submitting all claims, debts, and demands against the truster's estate to the decision of certain arbiters. The granter of the trust-deed and the trustee under it brought an action against an acceding creditor for the purpose of reducing the grounds of his claim on the head of fraud. The action was dismissed in respect of the clause of submission in the deed of accession, on the ground that there was no rule to the effect that questions of fraud did not fall under the general clause of arbitration which it contained.

The following passage occurs in Lord Chelmsford's judgment:— "It is clear that the creditors are to establish the validity of their debts to the satisfaction of the arbiter, and if it turns out that the debt is invalid by reason of its being founded in fraud, there is no more reason why the jurisdiction of the arbiter should be excluded from the consideration of that particular ground of invalidity than from the consideration of any other ground upon which the debt cannot be secured against the estate. Therefore I think it perfectly clear that the question of fraud is a question which is open to the arbiter under this deed."

Parties occupying a fiduciary capacity have not always power at common law to enter into submissions. In such a case they require special power to be conferred upon them either by Statute or by the deed under which they act. It has been held that a *curator bonis* to a major *incapax* has power at common law to enter into a submission as to his ward's moveable estate.[2] The law appears to be the same with regard to a factor *loco tutoris*. Hitherto executors, whether dative or nominate, who were not also trustees, have apparently had no power to enter into submissions;[3] but by the

[1] Earl of Kintore *v.* Union Bank, 24 D. 59, 1 M. (H.L.) 11, and 4 Macq. 465.

[2] Corson, Petitioner, 13 S. 1093.

[3] Persons called executors might, however, have the powers of trustees,— Ainslie *v.* Ainslie, 14 R. 209.

Executors (Scotland) Act, 1900, section 2, executors-nominate now possess the power to submit conferred on trustees by the Trusts Act, 1867, section 2 (5). There have been numerous cases in England as to the personal liability of executors (who have entered into a submission) for implement of the award where the executry estate is insufficient.[1]

In the case of Thomson's Trustees *v.* Muir[2] it was held that testamentary trustees under a deed which contained no power to refer were not entitled to refer to arbitration important claims connected with the trust-estate.

By the Trusts Act of 1867,[3] however, all persons answering to the description of trustees under the Trusts Acts have now power to compromise or to submit and refer all claims connected with the trust-estate, if such acts are not at variance with the terms or purposes of the trust. In England trustees have a similar power to refer.[4]

By section 2 of the Trusts (Scotland) Amendment Act, 1884,[5] "trustee" is declared to include "tutor, curator, and judicial factor," and "judicial factor" to mean "any person judicially appointed factor upon a trust-estate, or upon the estate of a person incapable of managing his own affairs, factor *loco tutoris*, factor *loco absentis*, and *curator bonis*." It would thus appear that a *curator bonis* or a factor *loco tutoris* has now by Statute power to enter into arbitrations with regard to his ward's estate, both heritable and moveable.

A trustee in bankruptcy has, with consent of the commissioners, power to refer to arbitration, under section 85 of the Bankruptcy Act, 1856.[6] The power is given to him in these words: "The commissioners shall superintend the proceedings of the trustee, concur with him in submissions and transactions. . . ."

A trustee under a trust-deed for behoof of creditors, which

[1] Russell, p. 30.
[2] Thomson's Trustees *v.* Muir, 6 M. 145.
[3] 30 and 31 Vict. c. 97, sec. 2, sub-sec. 5.
[4] Conveyancing Act, 1881 (44 and 45 Vict. c. 41), sec. 37; Russell, p. 32.
[5] 47 and 48 Vict. c. 63. See Scott *v.* Craig, 24 R. 462.
[6] 19 and 20 Vict. c. 17.

does not expressly confer on him power to submit, may apparently now exercise that power as a consequence of a recent decision to the effect that the operation of the Trusts Act, 1867, has been extended by the Trusts Act, 1884, to trusts in which the trustees do not act gratuitously.[1]

A submission signed by one partner without the special authority of the other partners does not bind the firm of which he is a member.[2]

It was formerly held that a married woman could not enter into a submission, on the ground that she could not bind herself to implement the award. This proposition must now, however, be stated with several qualifications.

(1.) When her husband's *jus mariti* and right of administration have been excluded, and she has thus a separate estate, she can enter into a submission as into any other contract with regard to it:

(2.) With her husband's consent she can also enter into a submission about her separate estate from which his *jus mariti*, but not his right of administration, has been excluded: and

(3.) Under the Married Women's Property Acts she can, in virtue of the Act of 1877, enter into a submission with regard to her earnings, or the investments representing them, while the Act of 1881, section 1, has obviously the effect of authorising her to enter into submissions with regard to the current income, and, with her husband's consent, also as to the capital of her separate estate.[3]

[1] Royal Bank, Petitioner, 20 R. 741.

[2] Lumsden *v.* Gordon, M. 14,567. The law is the same in England,—Lindley, p. 141; Russell, p. 24. But partners who were not parties to the submission may be held to have assented thereto,—Thomas *v.* Atherton, 10 L.R. Ch. D. 185. It has been held in England that the partner actually signing the submission is himself bound by the award,—Lindley, p. 141.

[3] Miller *v.* Durham, 13 R. 764. In this case a wife granted a discharge of legitim without her husband's consent. The Court held that it did not bind her. The same principle would apply to a submission about the capital of her separate estate.

It would seem that counsel's assent to a judicial reference will bind the client.[1] The law appears to be the same in England, if counsel have full information of the facts.[2]

In the case of Woodside *v.* Cuthbertson[3] a person entered into a submission as taking burden on himself for another person, who was resident in England, and bound himself and his own heirs, executors, and successors to implement the award to be pronounced thereupon. The person on whose behalf he contracted having become bankrupt, he was held personally liable to implement the award.[4]

In the case of Muirhead *v.* Stevenson[5] a submission was entered into between the factor for a landed proprietor and another party. The factor obliged himself to implement the award. The arbiters issued their award ordaining the proprietor (the factor's constituent) to pay a sum of money. It was held that the award did not warrant the obtaining of letters of arrestment against the proprietor.

An award has been held to be *res judicata* between the parties to the submission as regards the matters submitted, so that these matters cannot afterwards be re-opened before a Court of law.[6] The submission in this case took the form of a joint memorial to counsel. The award was signed by the referee, but was not a tested document.

When parties have deliberately selected an arbiter or arbiters as the tribunal for solving questions which have arisen or may arise between them, and the reference has been duly accepted, one of the parties cannot thereafter have recourse to a Court of Law.[7]

[1] Edinburgh Oil Gaslight Co. *v.* Clyne's Trustees, 2 S. & M'L. 243.

[2] Russell, p. 29. In England a solicitor acting in a case seems to be entitled without his client's special authority to agree to a reference of the case,—*Ibid.* p. 28.

[3] Woodside *v.* Cuthbertson, 10 D. 604.

[4] As to the position of brokers entering into a contract with an arbitration clause, see Hutcheson and Co. *v.* Eaton and Son, 13 Q.B.D. 861.

[5] Muirhead *v.* Stevenson, 10 D. 748.

[6] Fraser *v.* Lovat, 7 Bell's App. 171.

[7] Robertson *v.* Johnstone, 13 S. 289. See also Magistrates of Glasgow *v.*

But where a contract of copartnery contained an arbitration clause in the usual terms as to any differences which might arise between the partners, the Court refused to hold incompetent an action by one partner against the other, in which it was alleged that the defender had entered into a fraudulent transaction with a third party in order to bring about the bankruptcy of the partnership. The Court held, in the words of Lord President Boyle, that the averments disclosed a "downright malignant conspiracy to dissolve the partnership."[1]

A contract of copartnery provided that "in all matters relating to the copartnership . . . where any question or dispute or difference of opinion shall arise between the parties . . . every such question, dispute, or difference shall be and is hereby referred to . . . ." An arbiter was named. The partners differed as to the appointment of a new manager of the business, and certain of them took the matter before the arbiter. The Court interdicted the arbiter from acting on the ground that the matter was simply one relating to the internal management of the business of the copartnership, and was not a question which would have been within the jurisdiction of a Court of Law had there been no reference.[2]

Caledonian Railway Co., 19 R. 874. But *cf.* London and North-Western Railway Co., &c. *v.* Billington, Limited [1899], A.C. 79. See *supra*, p. 24, for form of plea in law, where it is maintained that the question brought before the Court falls under a submission.

[1] Lauder *v.* Wingate, 14 D. 633.

[2] Landale *v.* Goodall, 16 S.L.R. 434; but see Machin *v.* Bennett, reported in the *Weekly Notes* for June 30, 1900.

CHAPTER VII.

ARBITRATIONS UNDER THE LANDS CLAUSES ACT.

THE Lands Clauses Consolidation (Scotland) Act, 1845,[1] contains provisions as to arbitrations, which are set out below. Along with these are printed the sections in the corresponding English statute, except where the sections in the two statutes are identical. Explanations, authorities, and styles are given at the appropriate places.

APPOINTMENT OF ARBITERS.

The Scotch statute provides—

Appointment of arbiters when questions are to be determined by arbitration.

"XXIV. When any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorised or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbiter, each party, on the request of the other party, shall nominate and appoint an arbiter, to whom such dispute shall be referred; and every appointment of an arbiter shall be made on the part of the company under the hand of the secretary or any two of the directors of the company, and on the part of any other party under the hand of such party, or if such party be a company or corporation under the hand of the proper officer or person authorised by such company or corporation, and such appointment shall be delivered to the arbiters and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matters so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbiter, such other party fail to appoint an arbiter, then upon such failure the party making the request and having himself appointed an arbiter,

[1] 8 and 9 Vict. c. 19.

may appoint such arbiter to act on behalf of both parties, and such arbiter may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbiter shall be final."

The corresponding section in the English statute is as follows:—

Appointment of arbitrator when questions are to be determined by arbitration.

"XXV. When any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorised or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the said promoters, or any two of them, or of their secretary *or clerk*, and on the part of any other party under the hand of such party, *or if such party be a corporation aggregate under the common seal of such corporation;* and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final." [1]

Both arbiters may be appointed by a single writing in the following or like terms:—

"I, A., proprietor of E., on the one part, and we, the B. Company, incorporated by Act of Parliament, on the other part, do hereby appoint as our respective arbiters C. and D., to determine

[1] The words in *italics* are not in the Scotch enactment.

the amount of purchase-money and compensation to be paid to me, the said A., by the said B. Company, in respect of the taking by the said Company of the portions of land contained in a notice to treat by the said Company, dated , and extending to acres and one-thousandth parts of an acre or thereby, and the damage done to the remaining lands of me, the said A., and that in terms of 'The Lands Clauses Consolidation (Scotland) Act, 1895.'—In witness whereof."

When it has been agreed that the submission shall continue until the reference is exhausted without the prorogations required by the Lands Clauses Act,[1] and the submission is thus mixed statutory and common law,[2] the following clause should be inserted immediately before the testing clause:—

"Declaring that, notwithstanding the provisions of the said Act, this submission shall continue in full force and effect as regards the whole matters herein submitted until the award is pronounced."

When the parties agree upon a single arbiter, the submission will bear to be in favour of "C. as sole arbiter." When a tenant is the claimant the necessary variations are made on the style of the submission.

If it be desired that each arbiter be appointed separately, then each party will execute a separate writing. The nomination by the claimant may be in the following form:—

"I, A., proprietor of E., do hereby appoint B. to be arbiter on my behalf, to determine the amount of purchase-money and compensation to be paid to me by the C. Railway Company, incorporated by Act of Parliament, in respect of the taking by the said Company of the portions of land contained in a notice to treat by the said Company, dated , and extending to acres and one-thousandth parts of an acre or thereby, and the damage done to the remaining lands of me, the said A., and that in terms of 'The Lands Clauses Consolidation (Scotland) Act, 1845.'—In witness whereof."

[1] *Post.* p. 101.

[2] Caledonian Railway Co. *v.* Lockhart, 19 D. 527, 3 Macq. 808.

Sometimes, when there is a separate nomination of arbiter by the claimant, the nomination by him is addressed to the Company, and concludes with a notice by him to the Company that if they fail within fourteen days to appoint an arbiter on their behalf, the claimant will appoint the arbiter nominated by him to act on behalf of both parties.[1] This, however, is not a necessary clause, as the claimant has such right without giving any notice to the Company.

The nomination by the Company will be as follows :—

"We, the C. Railway Company incorporated by Act of Parliament, do hereby appoint D. to be arbiter on our behalf, to determine the amount of purchase-money and compensation to be paid to us to A. of E., in respect of the taking by us of the portions of land contained in a notice to treat by us, dated , and extending to acres and one-thousandth parts of an acre or thereby, and the damage done to the remaining lands of me, the said A., and that in terms of 'The Lands Clauses Consolidation (Scotland) Act, 1845.'—In witness whereof."

It has been held in England not to be necessary for the parties to attempt to concur in the appointment of a single arbiter before proceeding to appoint an arbiter for each party.[2] It has also been decided there that notice by one party to the other of his intention to appoint an arbiter is not equivalent to an actual appointment delivered to the arbiter and intimated to the other party.[3]

Scope of Submission.

In a submission under the Lands Clauses Act, the business of the arbiters or sole arbiter is to estimate the amount of compensasation due to the claimant. Their "duty is that of valuation merely."[4] It is competent for the arbiters to find that the damage

[1] A style is given in Deas and Ferguson, p. 947.

[2] Eagle *v.* Charing Cross Railway Co., 1867, 36 L.J. C.P. 297 ; C.J. Bovill, at p. 304.

[3] Bradley *v.* London and North-Western Railway Co., 5 Ex. 760.

[4] Alexander *v.* Bridge of Allan Water Co., 7 M. 492.

is infinitesimally small, and therefore that the amount of compensation is *nil*.[1] The compensation assessed by the arbiters includes not only the value of the land taken, but injury to the remaining land (if any) of the claimant by severance, détour, and the like.[2] This is provided by section 61 of the Act, which is as follows:[3]—

"In estimating the purchase-money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard shall be had not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act, or any other Act incorporated therewith.

There is an important difference between the law of Scotland and that of England with regard to the case of land injuriously affected. By section 61 of the Scotch Act compensation for this is given only to an owner, some portion of whose land is actually taken; and section 61 of the English statute is in practically identical terms. Under section 68 of the English Act, however, as interpreted by the Courts,[4] a man may be entitled to compensation on the ground that his land has been injuriously affected, though no part of his land be actually taken. There is no corresponding provision in the Scottish Lands Clauses Act, and accordingly in Scotland an owner is not entitled to compensation for the "injuriously affecting" of his land, unless some part of his land is actually taken. But where a statute like the Railways Clauses Act, 1845, or the Waterworks Clauses Act, 1847 (each of which does contain an "injuriously affected" provision (section 6 in each statute)) is incorporated in the Special Act or Public General

[1] Bradby *v.* Southampton Local Board, 4 E. & B. 1014. This case was about the construction of a sewer. It was under the English Public Health Act, 1848, not under the Lands Clauses Act.

[2] The principle of "betterment" has been introduced into arbitrations under the Light Railways Act, 1896, 59 & 60 Vict., c. 48, sec. 13, sub-sec. (1).

[3] The parallel section in the English Act is 63.

[4] Glover *v.* North Staffordshire Railway Co., 16 Q.B. 912; Metropolitan Board of Works *v.* Macarthy, L.R. 7 H.L. 243.

Statute[1] the promoters or public body are liable in damages for land injuriously affected even where land is not taken.

The compensation may be calculated on the footing not only of the present use of the land taken, but of its proximate future use,—*i.e.*, such an element as prospective feuing value may be estimated.[2] The compensation given by the arbiters must be for all damages that can be reasonably foreseen, and must be given once for all.[3] It is doubtful whether there can be a subsequent submission for damage that could not have been anticipated.[4]

In estimating the compensation the arbiters may include prospective damage "highly probable to arise in the ordinary course of events."[5] In the case cited the prospective damage was by flooding, through the water of the River Clyde being forced back by the Railway Company's embankment.

In a later case the arbiter, in estimating the value of a tenant's interest in a market garden, held that the ground had been specially prepared for growing fruit trees, and fixed the compensation to the tenant on that footing, although the fruit trees had not been planted. The Court refused to disturb the award.[6]

When a tenant whose lands are required under the Act holds under a lease containing breaks in favour of the landlord, he is entitled to compensation calculated on the footing that the lease will endure for its full period, subject to such deduction as the arbiter may think fit to make for the contingency of the landlord taking advantage of one or other of the breaks.[7]

A yearly tenant is (in Scotland) not entitled to have his claim

[1] *E.g.*, Public Health Act, 1897, sec. 4 (2).

[2] Russell, p. 262; Reg. *v.* Brown, L.R. 2 Q.B. 630.

[3] Chamberlain *v.* West End of London, &c. Railway Co., 2 B. & S. 605, per Erle, C.J., at p. 638.

[4] Croft *v.* London and North-Western Railway Co., 32 L.J. Q.B. 113; Todd *v.* Metropolitan District Railway Co., 24 L.T. 435.

[5] Caledonian Railway Co. *v.* Lockhart, 3 Macq. 808.

[6] Lanarkshire and Dumbartonshire Railway Co. *v.* Main, 22 R. 912.

[7] Fleming *v.* District Committee of the Middle Ward of Lanarkshire, 23 R. 98. (It is to be observed that the tenant in the end accepted the smaller sum in the alternative award.)

for compensation determined in a statutory arbitration whether his claim is for land taken or only on account of land injuriously affected. The procedure in this case is before the Sheriff, in terms of section 114 of the Act.[1]

One who holds a property under an agreement by which the price is to be paid partly by instalments spread over a period of years is not a yearly tenant, and is entitled to have his claim for compensation settled by arbitration.[2]

The compensation awarded by arbiters under the Lands Clauses Act must be in money.[3] But such arbiters can only assess the proper amount of the compensation. It has been held in England that they ought not to give a decree therefor.[4] By the form of award ordinarily in use in Scotland arbiters do give decree against the Company in favour of the claimant.[5] The English practice is clearly the more accurate one, and it has recently been followed in Scotland.[6] In Scotland it has been usual for arbiters to award interest at five per cent. on the amount of compensation found due by them from the date of the Company taking possession.[7] The English practice is not to award interest.[8]

The arbiters do not need to state separately compensation for land taken and for damage by severance to remaining land. But the award should show that both items have been considered.[9]

In England compensation has been given, (1) where part of the land belonging to the proprietor of a cotton mill was taken, for the increased risk of fire caused to the mill;[10] (2) where part of

[1] Caledonian Railway Co. *v.* Barr, 17 D. 312; Glasgow District Subway Co. *v.* Albin, 23 R. 81; Caledonian Railway Co. *v.* Morrison, 25 R. 1001.

[2] Caledonian Railway Co. *v.* Morrison, *supra*.

[3] Deas and Ferguson, 365.

[4] *In re* Harper *v.* Great Eastern Railway Co., L.R. 20 Eq. 39; for a style see 1 Key and Elphinstone, p. 177.

[5] Heritable Rights, p. 163.

[6] See Form of Award, *post*. p. 104.

[7] West Highland Railway *v.* Place, 21 R. 576.

[8] 1 Key and Elphinstone, p. 179.

[9] Bradshaw's Arbitration, 12 Q.B. 562.

[10] *In re* Stockport, &c. Railway Co., 33 L.J. Q.B. 251.

business premises have been taken, for the goodwill of the business, taking trade profits into consideration;[1] (3) for the cutting off of an access to the River Thames by taking the whole frontage between the river and the remaining property of the claimant.[2]

In England, where land is taken under the compulsory powers of the statute there appears to be a practice to put an enhanced value on the land where it can be shown to be specially adaptable for the purpose for which it is acquired. Thus in one case it was held that the owner of land adjoining Thirlmere Lake was entitled to compensation on the basis of its special adaptability for the purposes of a reservoir.[3]

Further, it has been decided in England that where land was taken compulsorily, which the claimants had acquired for the purpose of building a school, they were entitled to compensation on the footing of their intention to use the land for a school, although a school had not yet been built thereon. The principle applied was that the arbiter was entitled to take into account the intention of the claimants and the adaptability of the site for the purpose for which they intended to use it.[4]

This question of "adaptability" (whether for the purposes of the seller or the purchaser) has not been before the Courts in Scotland, but the adaptability of land acquired compulsorily for a reservoir has been elaborately discussed by the oversman in a recent reference between Lord Lamington and the Airdrie and Coatbridge Water Company.[5]

The arbiters in a Lands Clauses Act submission cannot consider any question as to the title of the claimant.[6] In other words

[1] Pile *v.* Pile, 3 Ch. D. 36.

[2] Duke of Buccleuch *v.* Metropolitan Board of Works, L.R. 5 H.L. 418.

[3] Ossalinsky *v.* Corporation of Manchester, reported only in Browne and Allan on Compensation, p. 718.

[4] Bailey *v.* Isle of Thanet Light Railways Co., 1900, 1 Q.B. 722.

[5] Excerpts from the Note by the Oversman are printed as an Appendix, see p. 113. Further details on the subject of compensation may be found in Rankine on Land Ownership, Deas and Ferguson on Railways, Cripps on Compensation, and Browne and Allan on Compensation.

[6] Alexander *v.* Bridge of Allan Water Co., 7 M. 492; Wilkins *v.* Mayor of Birmingham, 25 Ch. D. 78.

(as expressed in the English decisions) the arbiters cannot decide upon the validity of the claim.[1] In the case of Alexander *v.* Bridge of Allan Water Company the arbiter disallowed a claim made to certain water rights. The award was set aside. In a later case Lord Watson commented adversely on the ground of this decision, but not upon the decision itself.[2]

If an award assesses a lump sum for two claims, of which one is bad, the whole award is bad.[3] Thus where an award fixed one sum for lands which the Company had given notice to take, and for lands which the proprietor required the Company to take, under section 93 of the English statute (corresponding to section 91 of the Scotch Act), dealing with small portions of intersected land, and the submission by the Company was only as to the former land, the award was held to be bad.[4]

It has been held that "a body of statutory trustees constituted for the management and improvement of a public harbour, in acquiring land under the compulsory powers of an Act of Parliament which incorporated the Lands Clauses Act, cannot bind themselves and their successors to abstain from the exercise of their full statutory powers upon the land so taken, and so cannot, by tendering such an obligation, reduce the amount of compensation for injury to the seller's adjoining lands."[5]

In England the following decision has been given. A Railway Company, entitled under their special Act, notwithstanding section 92 of the English Lands Clauses Act (corresponding to section 90 of the Scotch statute), to take a portion of certain buildings without being obliged to take the remainder, if the portion taken could, in the opinion of the arbiter, be severed from the remainder without material detriment thereto, proposed to give an access to the

[1] Rhodes *v.* Airedale Drainage Commissioners, 1 C.P.D. 380.

[2] Adams *v.* Great North of Scotland Railway Co., 18 R. (H.L.) 1, at page 9.

[3] Beckett *v.* Midland Railway Co., L.R. 1, C.P. 241. This was a case not of lands taken, but of land injuriously affected. Duke of Buccleuch *v.* Metropolitan Board of Works, L.R. 5 H.L. 418.

[4] North Staffordshire Railway Co. *v.* Wood, 2 Ex. 244.

[5] Oswald *v.* Ayr Harbour Trs., 10 R. (H.L.) 85.

remainder of the property by means of a right of way over the part taken. The Court held that this proposal was not inconsistent with the purpose for which the land had been taken, and that the arbiter could take into consideration the whole circumstances of the case, including the sufficiency of the proposed access. In the particular case the railway was carried over the land taken by a viaduct, and the access offered was through an archway of the viaduct.[1]

In an arbitration under a similar clause in a special Act, varying section 90 of the Scotch Lands Clauses Act, the arbiter found that the portion of land taken could not be severed without material detriment to the remaining land; that in the event of its being decided, contrary to his view, that the Railway Company were entitled to take only the portion, the compensation was a certain sum, but that in the event of the decision being that the Railway Company were bound to take the whole lands, the compensation was a certain other sum, more than four times as large. The House of Lords held that the arbiter having received and considered the evidence, and decided against the Railway Company, his decision, as sole judge of law as well as of fact, was not open to review.[2] The judgments here contain observations on both the preceding cases.

An arbiter under the Lands Clauses Act may be examined as a witness in an action to enforce or to reduce his award, but he cannot be asked to explain or to contradict what is contained in the award. Nor can he be asked to explain (if he can) the mental process by which he arrived at the sum awarded. He can, however, be asked to say what passed before him, what matters were presented to him, and whether he took or did not take into account anything not covered by the words of the Act.[3] In the Scotch case referred to there was a special Act, which provided only for "structural damage" done to buildings by the making of

[1] *In re* Gonty *v.* Manchester, Sheffield, and Lincolnshire Railway Co. [1896], 2 Q.B. 439.

[2] Caledonian Railway Co. *v.* Turcan, 25 R. (H.L.) 7. See also Duke of Buccleuch *v.* Metropolitan Board of Works, L.R. 5 Ex. 221, at p. 232.

[3] Duke of Buccleuch *v.* Metropolitan Board of Works, L.R. 5 H.L. 418; Glasgow District Railway Co. *v.* Macgeorge, 13 R. 609.

a tunnel. The Railway Company unsuccessfully sought reduction of the award on the ground that the arbiter had read speculative deterioration of the property into the phrase "structural damage."

It has been held in England that arbiters under the Lands Clauses Act cannot fix accommodation works[1] unless the submission expressly confers on them power to do so,[2] nor find a sum of money due to the claimant for an accommodation work constructed by him,[3] nor apportion rent where a portion only of leasehold premises is taken.[4] In Scotland the submission sometimes confers on the arbiters express power to settle accommodation works.

Interdict of Arbitration Proceedings.

Where arbiters have been appointed in an arbitration under the Lands Clauses Act, the Court will not interfere to stop by interdict the arbitration proceedings, unless it is clear that something in excess of their powers is being submitted to the arbiters, or that the claimant has failed to show a *prima facie* relevant case for compensation.[5]

In England the following points have been decided,—that the Court has no jurisdiction to restrain a statutory arbitration on the ground that the arbiters have no jurisdiction,[6] nor will it restrain a statutory arbitration commenced in the name of a person who has given no authority to use his name.[7] But the Court will restrain an arbiter from acting if he is guilty of misconduct.[8]

[1] *In re* Ware, 9 Ex. 395.

[2] Skerratt *v.* North Staffordshire Railway Co., 5 Railway Cases, 166.

[3] Regina *v.* South Wales Railway Co., 13 Q.B. 988.

[4] *In re* Ware, *supra*. *In re* Byles, 11 Ex. 464.

[5] Dumbarton Water Commissioners *v.* Lord Blantyre, 12 R. 115 ; Glasgow, Yoker, and Clydebank Railway Co. *v.* Lidgerwood, 23 R. 195. Caledonian Railway Co. *v.* Morrison, 25 R. 1001. See as to interdict of Common Law Arbitrations, *supra*, p. 41.

[6] North London Railway Co. *v.* Great Northern Railway Co., 11 Q.B.D. 30.

[7] London and Blackwall Railway Co. *v.* Cross, 31 Ch. D. 354.

[8] Malmesbury Railway Co. *v.* Budd, 2 Ch. D. 113 ; Beddow *v.* Beddow, 9 Ch. D. 89.

Supplementary Provisions.

The Scotch statute contains the following further provisions as to arbitrations:—

Vacancy of arbiter to be supplied.

"XXV. If, before the matters so referred shall be determined, any arbiter appointed by either party die, or become incapable, the party by whom such arbiter was appointed may nominate and appoint in writing some other person to act in his place, and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbiter may proceed *ex parte;* and every arbiter so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbiter at the time of such his death or disability as aforesaid.

Appointment of oversman.

"XXVI. Where more than one arbiter shall have been appointed such arbiters shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an oversman to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special Act; and if such oversman shall die, or become incapable to act, they shall forthwith after such death or incapacity appoint another oversman in his place; and the decision of every such oversman on the matters on which the arbiters shall differ shall be final.

Lord Ordinary empowered to appoint an oversman on neglect of the arbiters.

"XXVII. If in either of the cases aforesaid the said arbiters shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an oversman, it shall be lawful for the Lord Ordinary, on the application of either party to such arbitration, to appoint an oversman, and the decision of such oversman on the matters on which the arbiters shall differ, or which shall be referred to him under this or the special Act, shall be final.

In case of death of single arbiter, the matter to begin *de novo.*

"XXVIII. If, when a single arbiter shall have been appointed, such arbiter shall die, or become incapable to act, before he shall have made his award, the matters referred to him shall be determined by arbitration, under the provisions of this or the special Act, in the same manner as if such arbiter had not been appointed.

If either arbiter refuse to act, the other to proceed *ex parte.*

"XXIX. If, when more than one arbiter shall have been appointed, either of the arbiters refuse or for seven days neglect to act, the other arbiter may proceed *ex parte*, and the decision of such arbiter shall be as effectual as if he had been the single arbiter appointed by both parties.

If arbiters fail to make their award within twenty-one days, the matter to go to the umpire.

"XXX. If, where more than one arbiter shall have been appointed, and neither of them shall refuse or neglect to act as aforesaid, such arbiters shall fail to make their award within twenty-one days after the day on which the last of such arbiters shall have been appointed, or within such extended time as shall have been appointed for that purpose by both such arbiters under this Act, the matters referred to them shall be determined by the umpire to be appointed as aforesaid.

Power of arbiters to call for books, &c.

"XXXI. The said arbiters or their oversman may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose, and take all evidence competent according to the law of Scotland.

Costs of arbitration how to be borne.

"XXXII. All the expenses of any such arbitration and incident thereto, to be settled by the arbiters or oversman, as the case may be, shall be borne by the promoters of the undertaking, unless the arbiters or oversman shall award the same sum as or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own expenses incident to the arbitration; and in all cases the expenses of the arbiters or oversman, as the case may be, and of recording the decreet-arbitral or award in the books of the Council and Session, shall be borne by the promoters of the undertaking.

Award to be delivered to the promoters of the undertaking.

"XXXIII. The arbiters shall make their decreet-arbitral or award in writing, and shall cause the same to be recorded in the books of Council and Session, or shall deliver the same to the promoters of the undertaking, to be by them so recorded, and the said promoters shall, on demand, at their own expense, furnish an extract thereof from the said books to the other party to the arbitration; and extracts of decreets-arbitral or awards shall bear faith in all Courts and cases the same as the original writings, unless the originals be improven.

Award not to be set aside for error in form.

"XXXIV. No award made with respect to any question referred to arbitration under the provisions of this or the special Act shall be set aside for irregularity or error in matter of form.

If arbitration or award not made within a limited time, compensation to be settled by a jury.

"XXXV. If the party claiming compensation shall not, as hereinbefore provided, signify his desire to have the question of such compensation settled by arbitration, or if, when the matter shall have been referred to arbitration, the arbiters or their umpire shall for three months have failed

to make their or his award, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided."

The following sections of the English Act are identical,—section 26 with section 25, section 27 with section 26, section 29 with section 28, section 30 with section 29, section 37 with section 34. Section 28 of the English Act, corresponding to section 27 of the Scotch Act, is as follows :—

" If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, the Board of Trade, [in any case in which a railway company shall be one party to the arbitration, and two justices in any other case, shall],[1] on the application of either party to such arbitration, appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special Act, shall be final."

Section 31 of the English Statute is identical with section 30 of the Scotch Act, except that the words " if any " occur after the words " extended time," and the words " their hands " instead of the words " this Act."

Section 32 of the English Act, parallel to section 31 of the Scotch Act, is as follows :—

" The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose."

Section 33 of the English Act does not occur in the Scotch Act :—

" Before any arbitrator or umpire shall enter into the consideration of any matters referred to him, he shall in the presence of a justice make and subscribe the following declaration ; that is to say,

' I, A. B., do solemnly and sincerely declare, That I will faithfully and honestly, and to the best of my skill and ability, hear and

[1] The words in square brackets were repealed by the Lands Clauses Umpire Act, 1883 (46 Vict. c. 15).

determine the matters referred to me under the provisions of the Act [*naming the special Act*]. A. B.
Made and subscribed in the presence of .'

"And such declaration shall be annexed to the award when made; and if any arbitrator or umpire having made such declaration shall wilfully act contrary thereto he shall be guilty of a misdemeanor."

Section 34 of the English Act, parallel to section 32 of the Scotch Act, is as follows:—

"All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking; in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions."

Section 35 of the English Act, parallel to section 33 of the Scotch Act, is as follows:—

"The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party or any person appointed by him for that purpose."

The English Act contains the following provision, section 36, which is not in the Scotch Statute:—

"The submission to any such arbitration may be made a rule of any of the Superior Courts, on the application of either of the parties."

Arbitration is also referred to in the following sections of the Scotch Act,—63, 64, 65, and 66 (compensation to absent party), 91 and 92 (small portions of intersected land), and 123 (sale of superfluous lands).

Appointment of Oversman.

In terms of section 26, the arbiters (when more than one arbiter has been appointed) must in writing nominate an overs-

man before they enter on the work of the reference. It has been held in England that the oversman (umpire) need not be appointed within twenty-one days after the appointment of the arbiters is complete, and that he may be appointed at any time within three months after the arbiters have been appointed.[1]

The appointment of the oversman is usually made by the arbiters in the writing in which they accept and prorogate the reference. This writing may be in the following terms and endorsed on the submission:—"We, A. and B., designed in the foregoing nomination, do hereby accept the reference, appoint C. to be oversman in the reference, and extend the time for the determination of the matters referred to us till the expiry of three months from the day of 1900. [*Here insert the last date of the submission.*]" When the arbiters have been appointed by separate nominations, the necessary alterations will be made. At each prorogation of the reference by them the arbiters must of new appoint the oversman.

In terms of section 27, if the arbiters refuse or neglect to appoint an oversman, either party to the submission may apply to the Lord Ordinary to appoint an oversman. The Lord Ordinary means the Lord Ordinary on the Bills in vacation, or the Junior Lord Ordinary in session.[2] In one case, the arbiters having failed to agree in naming an oversman, the Lord Ordinary appointed an oversman under this section of the statute. It was afterwards found that the person thus appointed oversman had acted as Sheriff's valuer for compensation. The claimant moved the Lord Ordinary to recal the appointment. The Lord Ordinary refused to do so, as the oversman had already accepted. The Court adhered, because they considered that there was no legal disqualification of the oversman, and that, as the Lord Ordinary's actings were purely ministerial, there was no review of his decision.[3]

Under a Private Act of Parliament differences were to be

[1] Bradshaw's Arbitration, 12 Q.B. 562.
[2] Sec. 3.
[3] Mackenzie *v.* Inverness and Ross-shire Railway Co., 24 D. 251.

referred to an arbiter appointed by "the Sheriff of the county of Lanark." The Court held that in appointing an arbiter under this enactment the Sheriff was acting in his administrative capacity and not as a judge, and therefore that an appeal to the Court against the nomination made by him was incompetent.[1]

The application to the Lord Ordinary is by petition addressed in the ordinary way to the Lords of Council and Session. It sets out the nomination of arbiters and their failure to appoint an oversman, and refers to the section of the statute. The prayer, after craving intimation to the other party and to the arbiters, prays the Court "to appoint, in terms of the Lands Clauses Consolidation (Scotland) Act, 1845, a fit person to be oversman in the said reference, with the powers conferred by the said statute."[2]

Section 29 does not seem to have been made the subject of judicial construction, but there have been decisions upon the corresponding section of the English Act, and as the two sections are in identical terms these decisions are no doubt of authority in Scotland. It has been held for instance that the mere fact that one of the arbiters does not attend one or more meetings to which he has been summoned is not a refusal in the sense of this enactment;[3] that delay in making an award because an arbiter takes a mistaken view of the law may be neglect within the meaning of the section;[4] and that when one arbiter refuses or neglects to act, the other arbiter may proceed *ex parte* to make an award, although no umpire has been appointed.[5]

Prorogation.

The provisions as to the endurance of a statutory arbitration are contained in the 30th and 35th sections, in both of which the English word "umpire" has been inserted *per incuriam* in place of the Scotch word "oversman." The former of these

[1] Magistrates of Glasgow *v.* Glasgow District Subway Co., 21 R. 52.
[2] Deas and Ferguson, p. 936.
[3] *In re* Hawley *v.* North Staffordshire Railway Co., 2 De G. & S. 33.
[4] Willoughby *v.* Willoughby, 9 Q.B. 923.
[5] Shepherd *v.* Corporation of Norwich, 30 Ch. D. 553.

enacts that when more than one arbiter has been appointed, if they shall fail to make their award within twenty-one days after the day on which the last of such arbiters shall have been appointed, or within such extended time as shall have been appointed for that purpose by both the arbiters under the Act, the matters referred to the arbiters shall devolve upon the oversman.

The 35th section, which has been very strictly construed,[1] provides that if the arbiters or oversman shall for three months have failed to make their award, the question of compensation shall be settled by the verdict of a jury. Accordingly, the arbiters have twenty-one days from the last date of the submission, or from the date of the appointment of the last of the arbiters if they have been appointed by separate nominations, in which to make their award without any prorogation.

If the arbiters execute a minute of prorogation along with their acceptance of the submission and their appointment of an oversman,[2] they have then three months from the last date of the submission in which their award can be issued; if they are not ready within that period, they must before the expiry of the first three months obtain a minute of prorogation by the parties[3] (who are entitled if they please to prorogate[4] the submission); and they must immediately follow this up by another minute of prorogation by themselves and a new appointment of oversman.[5]

Failing these minutes of prorogation being duly executed, the submission will devolve upon the oversman. He in his turn has three months within which to issue his award. In England it has been held that this period of three months begins at the time when the duty devolves on the umpire.[6] But if the time for the arbiters

[1] Laing *v.* Caledonian Railway Co., 12 D. 481 ; Anderson *v.* Deeside Railway Co., 15 D. 713 ; Mackenzie *v.* Inverness, &c. Railway Co., 4 M. 810.

[2] Heritable Rights, p. 161.

[3] *Ibid.* p. 162.

[4] Clark *v.* City of Glasgow Union Railway Co., 6 S.L.R. 185.

[5] Heritable Rights, p. 163. Glasgow, &c. Railway Co. *v.* Nitshill Coal Co., 7 Bell's App. 325.

[6] Skerratt *v.* North Staffordshire Railway Co., 5 Railway Cases, 166 ; Bradshaw's Arbitration, 12 Q.B. 562.

to give their award has expired, and the umpire is afterwards appointed, the three months run from the date of his appointment.[1] If he is not ready to decide before these three months have elapsed, he must obtain a minute of prorogation from the parties, and follow it up by a like minute of prorogation by himself.

The following are forms of minutes of prorogation:—

By the Parties.

"We, A. and B., the parties named and designed in the foregoing minute of reference, do hereby extend the time for determining the matter submitted till the lapse or termination of three months from and after the last date hereof.—In witness whereof."

By the Arbiters.

"We, C. and D., the arbiters named and designed in the foregoing reference, do hereby extend the time for fixing and determining the matter submitted to us till the lapse or termination of the three months allowed by 'The Lands Clauses Consolidation (Scotland) Act, 1845,' to arbiters for giving their awards in matters of arbitration, and of new nominate F., above designed, to be our oversman, in terms of the said Lands Clauses Act.—In witness whereof."

When the submission contains a clause providing that prorogations of the submission from time to time shall not be necessary, but that the reference shall subsist without prorogation until the arbiters or oversman give an award, it is called "mixed statutory and common law."[2] In such case periodical prorogations by the parties or the arbiters are not required.

EXPENSES.

The expenses of every statutory arbitration are by the 32d section imposed upon the promoters of the undertaking, unless the

[1] Pullen *v.* Corporation of Liverpool, 51 L.J. Q.B. 285.

[2] Caledonian Railway *v.* Lockhart, 3 Macq. 808.

sum awarded is smaller than the tender, where a tender has been made by the promoters. In this latter case each party to the submission has to bear his own expenses. In all cases, however, the expenses of both of the arbiters and of the oversman are to be borne by the promoters.

The account of the clerk in a Lands Clauses Act submission forms part of the arbiters' expenses.[1] The first part of the corresponding section of the English Statute[2] is substantially identical with the Scotch Act, but where the sum awarded is less than the sum tendered, the English Act provides that the costs of the arbitrators shall be borne by the parties in equal proportions.

The following points have been decided under that section:— The expenses of the reference include the cost of the award,[3] and also the reasonable remuneration of the arbiters and oversman.[4] The words "any such arbitration" refer not merely to arbitrations under the Lands Clauses Act, but also to arbitrations under special Acts incorporating the Lands Clauses Act where the special Act contains no provision to the contrary.[5] An arbitration under the English Public Health Act of 1875 was held to be an arbitration under the Lands Clauses Act.[6] A reference entered into in anticipation of the passing of a special Act incorporating the Lands Clauses Act is not within the section.[7] A proprietor is entitled under this section to his expenses in an arbitration where no offer has been made by the Company.[8] Moreover, an offer by the Company, to be effectual under the section, must be in respect of the same subject-matter as the claim. Thus, part of a landlord's claim was in respect of damage that would be caused to the remainder of his land by cutting it off

[1] Burnet *v.* Henry, 5 M. 96.
[2] Sec. 34.
[3] *In re* Walker and Son *v.* Brown, 9 Q.B.D. 431.
[4] Murray *v.* North British Railway Co., 2 F. 460.
[5] Sharpe *v.* Metropolitan Railway Co., 5 App. Cases, 425.
[6] *Ex parte* Rayner, 3 Q.B.D. 446.
[7] Catling *v.* Great Northern Railway Co., 18 W.R. 121.
[8] Martin *v.* Leicester Waterworks Co., 3 H. & N. 463.

from the natural outfall for its drainage. The Company previous to arbitration made an offer of £11,000. When the parties were before the arbiter, it was arranged that a right should be reserved to the landlord of making a sewer to drain his land under the railway and land of the Company, and accordingly no claim in respect of such damage was ultimately submitted to the arbiter, who awarded to the proprietor the sum of £10,029. It was held that, although the sum awarded was less than the Company's offer, they were bound to pay the costs of the arbitration.[1]

The expenses need not be incorporated in the award, but may be determined by the arbiters or the oversman if the submission has devolved on him, and this may be done after the time period of the reference has expired.[2]

Where the award gives more than the Company offered with regard to part of the claim, but nothing as to another part as to which the Company made no offer, the Company will only have to pay the costs effeiring to that part of the claim for which compensation has been awarded.[3] The comparison is between the total sum offered and the total sum assessed, and not between the several items of which these totals are respectively composed.[4] The offer must be an unconditional offer of compensation, and not an offer of one sum for compensation and expenses.[5] An offer made after the arbiters are appointed is too late.[6]

Expenses are payable within a reasonable time after the award, and where the arbitration relates to the value of land taken, the execution of a conveyance is not a condition precedent to payment of expenses.[7] The seller has no lien on the land sold for the costs of the arbitration fixing the price payable by the Company.[8]

[1] Miles *v.* Great Western Railway Co. [1896], 2 Q.B. 432.
[2] Gould *v.* Staffordshire Potteries Waterworks Co., 5 Ex. 214.
[3] Regina *v.* Biram, 17 Q.B. 969.
[4] Hayward *v.* Metropolitan Railway Co., 4 B. & S. 787.
[5] Balls *v.* Metropolitan Board of Works, L.R. 1 Q.B. 337.
[6] Fitzhardinge *v.* Gloucester and Berkeley Canal Co., L.R. 7 Q.B. 776; Gray *v.* North-Eastern Railway Co., 1 Q.B.D. 696.
[7] Capell *v.* Great Western Railway Co., 11 Q.B.D. 345.
[8] Ferrers *v.* Stafford and Uttoxeter Railway Co., 13 Eq. 524.

By a statute (which applies to England only) "The Lands Clauses (Taxation of Costs) Act, 1895,"[1] it is provided that the expenses of the arbitration, when either party thereto shall so require, may be settled by a taxing-master of the Supreme Court. There is in Scotland no corresponding Act, but the arbiters in statutory submissions of importance frequently remit to the Auditor of the Court of Session to tax the claimant's account of expenses.

The Award.

The 33d section deals with the award itself. It must be in writing, and must be either recorded in the books of Council and Session by the arbiters themselves, or delivered to the promoters to be recorded by them. The promoters are bound to furnish an extract to the other party in the arbitration when asked for by him, and are also bound to pay for this extract.[2] An award in a Lands Clauses submission is reducible in whole or in part on the grounds already discussed in dealing with awards in general.[3]

As already mentioned,[4] it has been usual in Scotland for arbiters in a Lands Clauses submission to give a decerniture as well as a finding.[5] The English practice is, however, preferable,[6] and it has been followed in Scotland in recent years. The following are the operative clauses in an award pronounced by Lord Shand, who was oversman in an important submission between the City of Edinburgh and the North British Railway Company:—

"I find that the sum due and payable to the claimants by the said Company as compensation for their interest as absolute owners in the lands and hereditaments belonging to them, taken by the said Company by virtue of the provisions of their said Act

[1] 58 Vict. c. 11.
[2] London and North-Western Railway Co. *v.* Walker [1900], L.R. A.C. 109.
[3] See p. 59 *et seq.*
[4] *Supra*, p. 89.
[5] Heritable Rights, p. 163; Deas and Ferguson, p. 952.
[6] 1 Key and Elphinstone, p. 177.

of 1891 under the notice referred to in the proceedings, and for the damage or injury sustained and to be sustained by the remaining lands belonging to the said claimants by or through the taking of the said lands and hereditaments, amounts to the sum of £ ; and I direct the said nominations of arbiter and this decree-arbitral to be recorded in the books of Council and Session, or others competent, for preservation ; and I direct an extract thereof to be furnished to the said claimants."[1]

A very good style is afforded by the following decree-arbitral actually pronounced in a recent Lands Clauses Act submission :—

"I, A., considering that by joint minute of reference dated , entered into between B., proprietor in fee-simple of the estate of C., and the D. Railway Company, incorporated by Act of Parliament, I was appointed to be sole arbiter to determine the amount of purchase-money and compensation to be paid by the said Company to the said B. in respect of the taking by the said Company in virtue of (*here the special Act is referred to*) and the Lands Clauses Consolidation (Scotland) Act, 1845, and other Acts incorporated by the first-mentioned Act, of certain lands in the parish of E., forming part of the said estate of C., which lands are shown and coloured red on the plan signed as relative to the said minute of reference, and extend to or thereby imperial measure, and also in respect of the damage to the remaining lands of the said B.: And now seeing that I have considered the said minute of reference, inspected the lands, and issued notes of my proposed findings, with which the parties are satisfied, therefore I do hereby pronounce my decree-arbitral as follows, viz.—I hereby find that the sum of £ , with interest thereon at the rate of five per cent. per annum from the day of 1900, when the said Company took possession of the said lands, is the full purchase-money and compensation due and payable by the said Company to the said B. in respect of the said portions of land extending to imperial measure, and in respect of all

[1] The award is dated 21st November 1892.

claims and damages arising or occasioned to the remainder of the subjects of which the portions of land so taken are part by the taking of the said land, and by the construction of the works authorised by the said Acts: And I direct the said Company to register the said minute of reference and these presents in the books of Council and Session for preservation, and to furnish extracts thereof to the said B.: And I consent to the registration hereof for preservation.—In witness whereof."

It will be observed that this style contains a finding of interest due. On this subject reference is made to what has been already said.[1]

[1] *Supra*, p. 89.

CHAPTER VIII.

ARBITRATIONS UNDER VARIOUS STATUTES.

In connection with various matters the settlement of disputes by arbitration is authorised or made compulsory by a number of statutes. Some of these introduce the whole provisions of the Lands Clauses Acts so far as arbitration is concerned; others contain special provisions designed to meet the special circumstances of the enactment or the matters with which it deals; and others merely authorise recourse to arbitration without prescribing any detailed procedure.

For the convenience of the reader, it has been thought proper to bring together the more important of these statutes, so far as Scotland is concerned, and to give under each a reference to illustrative cases in which its provisions with regard to arbitration have been subjected to judicial interpretation. The headings explain the subject-matter of the different statutes.

Admiralty.

Harbour Transfer Act, 1862 (25 and 26 Vict. c. 69, secs. 8-10).

Agricultural Holdings Act.

See *Landlord and Tenant.*

Allotments.

55 and 56 Vict. c. 54 (1892), sec. 3 (4).

Board of Trade.

See *Admiralty, Railways, Telegraphs, Tramways.*

Building Societies.

37 and 38 Vict. c. 42 (1874), secs. 34, 35, and 36.

47 and 48 Vict. c. 41 (1884), sec. 2.

Wright *v.* Monarch Benefit Building Society [1877], 5 Ch. D. 726.

BUILDING SOCIETIES—*continued.*

Knight *v.* Tabernacle Permanent Building Society [1892], 2 Q.B. 613, A.C. 298.

Note.—Observe the effect of the Act of 1894 on this decision.

Mitchells *v.* Caledonian Property, &c. Society [1886], 13 R. 918.

Municipal Permanent Investment Building Society *v.* Richards [1888], L.R. 39 Ch. D. 372.

Galashiels, &c. Society *v.* Newlands [1893], 20 R. 821.

57 and 58 Vict. c. 47 (1894), sec. 20.

Norton *v.* Counties Conservative Society [1895], L.R. 1 Q.B. 246 (decided in 1894).

CEMETERIES.

Clauses Act, 1847 (10 and 11 Vict. c. 65, sec. 6).

COMPANIES.

Clauses Act, 1845, secs. 131 to 136 (8 and 9 Vict. c. 17).

Companies Act, 1862, secs. 72, 73, and 162 (25 and 26 Vict. c. 89).

Anglo-Italian Bank *v.* De Rosaz [1867], L.R. 2 Q.B. 452; L.R. 4 Q.B. 462 [1869] (on sec. 162).

COURT OF SESSION.

13 and 14 Vict. c. 36 (1850), sec. 50.

CROWN LANDS.

10 Geo. IV. c. 50 (1829), sec. 94.

Woods and Forests (1833), secs. 2 and 3 (3 and 4 Will. IV. c. 69).

ELECTRIC LIGHTING.

45 and 46 Vict. c. 56 (1882), sec. 28.

Electric Lighting Clauses Act, 1899, Schedule, secs. 15 (*c*), (*d*), and (*e*), 17 (*b*), (*c*), and (*d*), 20 (1) and (2), 25 (2) and (5), 27 (6), 28 (2), 34, 67 (*d*) and (*e*), 68, and 83 (1), (62 and 63 Vict. c. 19).

EXPLOSIVES.

38 Vict. c. 17 (1875), sec. 25 and Second Schedule.

The Local Authority under the Explosives Act is now the County Council—(Local Government Act, 1889, sec. 11 (5)).

FACTORIES AND WORKSHOPS.

54 and 55 Vict. c. 75 (1891), secs. 7 and 8 and First Schedule.

58 and 59 Vict. c. 37 (1895), secs. 11 and 12.

FRIENDLY SOCIETIES.

59 and 60 Vict. c. 25 (1896), secs. 68 and 80.

This Act consolidates the law on the subject, and repeals (see Sched. iii.) practically the whole of the earlier legislation.

Gollings *v.* The Tradesmen's Friendly Society, Peterborough [1891], 64 L.T. (N.S.) 775.

FRIENDLY SOCIETIES—*continued.*

Prentice *v.* London, &c. [1875], L.R. 10 C.P. 679.
Morrison *v.* Glover [1849], 4 Ex. 430.
Willis *v.* Wells [1892], L.R. 2 Q.B. 225.
Bache *v.* Billingham [1894], L.R. 1 Q.B. 107.
Stone *v.* The Liverpool Marine Society [1894], 63 L.J. Q.B. 471.

These cases are all on the earlier Statutes.

GAS.

Clauses Act, 1871, sec. 27 (34 and 35 Vict. c. 41).

HARBOURS, &C.

Clauses Act, 1847, sec. 6 (10 and 11 Vict. c. 27).
Harbour Transfer Act, 1862, secs. 8-10 (25 and 26 Vict. c. 69). (Some words in sec. 8 are repealed,—S.L.R. Act, 1893, No. 1.)

HOUSING OF THE WORKING-CLASSES.

53 and 54 Vict. c. 70 (1890), secs. 20, 41, 94, and Second Schedule.
Wilkins *v.* Birmingham Corporation [1883], 25 Ch. D. 78.

This case was on an earlier Statute.

Ex parte Stevenson [1892], L.R. 1 Q.B.D. 609.

INDUSTRIAL AND PROVIDENT SOCIETIES.

56 and 57 Vict. c. 39 (1893), sec. 49.
Skipton Industrial Society *v.* Prince [1864], 33 L.J. Q.B. 323.
Symington's Executors *v.* Galashiels Co-operative Store [1894], 21 R. 371.

This case also was on an earlier Statute.

LANDLORD AND TENANT.

Agricultural Holdings Act, 1883 (46 and 47 Vict. c. 62), secs. 8-24. (But see the repeals by the Agricultural Holdings Act, 1900, Third Schedule.)
Sinclair *v.* Clyne's Trs. [1887], 15 R. 185.
Sinclair *v.* Brown [1892], 19 R. 780.

The tribunal set up by the Crofters Acts, 49 and 50 Vict. c. 29, and 50 and 51 Vict. c. 24, is to all intents and purposes a statutory arbiter. As to its powers see Sitwell *v.* Macleod [1899], 1 F. 950.

Agricultural Holdings Act, 1900, sec. 2 (63 and 64 Vict. c. 50).

The Second Schedule of this Statute contains very specific provisions (some of which are quite novel) for the regulation of arbitrations thereunder.

LIGHT RAILWAYS.

59 and 60 Vict. c. 48 (1896), secs. 13 and 15.

LOCAL GOVERNMENT.

57 and 58 Vict. c. 58 (1894), secs. 25 and 26.

MARKETS AND FAIRS.

Clauses Act, 1847, sec. 6 (10 and 11 Vict. c. 14).

MASTER AND SERVANT.

5 Geo. IV. c. 96 (1824). (Section 1 repealed,—S.L.R. Act, 1873.)

7 Will. IV. and 1 Vict. c. 67 (1837).

Arbitration (Masters and Workmen) Act, 1872 (35 and 36 Vict. c. 46). (The words "and be it further enacted" in certain sections repealed,—S.L.R. Act, 1888, No. 2. Preamble repealed,—S.L.R. Act, 1893, No. 3.)

Workmen's Compensation Act, 1897,—particularly the Second Schedule (60 and 61 Vict. c. 37).

MINES.

Metalliferous Mines Regulation Act, 1872, sec. 21 (35 and 36 Vict. c. 77).

Secretary of State for Home Department *v.* Fletcher [1887], 17 Q.B.D. 339.

Coal Mines Regulation Act, 1887, sec. 47 (50 and 51 Vict. c. 58).

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1 and 2 Vict. c. 98 (1838), secs. 6, 16-18.

31 and 32 Vict. c. 119 (1868). See under *Railways.*

36 and 37 Vict. c. 48 (1873), sec. 19. See under *Railways.*

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40 and 41 Vict. c. 53 (1877), sec. 68.

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60 and 61 Vict. c. 38 (1897). Part viii., Acquisition of Lands, particularly sec. 145, sub.-secs. 11 (*a*), and 12.

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Conveyance of Mails Act, 1838, secs. 6, 16-18 (1 and 2 Vict. c. 98). (But for an alternative to arbitration see Regulation of Railways Act, 1873, sec. 19; and Postmaster-General *v.* Highland Railway Co. [1874], 2 Railway and Canal Traffic Cases, 34.)

Companies Clauses (Scotland) Act, 1845, secs. 131-136 (8 Vict. c. 17).

Lands Clauses (Scotland) Act, 1845 (8 and 9 Vict. c. 19). (See *supra,* p. 83 to p. 106.)

Railways Clauses (Scotland) Act, 1845, sec. 6, and secs. 119-129 (8 and 9 Vict. c. 33).

Abandonment of Railways Act, 1850, secs. 21, 22, and 25 (13 and 14 Vict. c. 83).

Railway Companies Arbitration Act, 1859 (22 and 23 Vict. c. 59).

RAILWAYS—*continued.*

Caledonian Railway Co. *v.* Greenock, &c. Railway Co. [1874], 10 M. 893 ; aff. 1 R. (H.L.) 8.

Observed on in the immediately following case.

London, Chatham, and Dover Railway Co. *v.* South-Eastern Railway Co. [1888], 40 Ch. D. 100.

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Regulation of Railways Act, 1868, secs. 30, 31, and 32 (31 and 32 Vict. c. 119).

Regulations of Railways Act, 1873, secs. 8 and 19. See Postmaster-General *v.* Highland Railway Co., *supra*. As to sec. 8, see the Railway and Canal Traffic Act, 1888, sec. 15 (36 and 37 Vict. c. 48).

Torbay, &c. Railway Co. *v.* South Devon Railway Co. [1876], 2 R. & C.T. Ca. 391.

Portpatrick Railway *v.* Caledonian Railway [1878], 3 R. & C.T. Ca. 189.

Disapproved in the immediately following case.

Waterford and Limerick Railway Co. *v.* Great Western Railway Co. [1881], 17 Ch. D. 493.

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Caledonian Railway Co. *v.* Greenock and Wemyss Bay Railway Co. [1878], 5 R. 995.

Board of Trade Arbitrations, &c., 1874 (37 and 38 Vict. c. 40). (Section 5 has been repealed,—S.L.R. Act, 1883. Preamble repealed, —S.L.R. Act, 1893, No. 2.)

Post-Office (Parcels) Act, 1882, sec. 8 (45 and 46 Vict. c. 74).

Railway and Canal Traffic Act, 1888, sec. 15 (51 and 52 Vict. c. 25).

This is the Act establishing the Railway Commission.

National Defence Act, 1888, sec. 4 (6), (51 and 52 Vict. c. 31).

SAVINGS BANKS.

7 and 8 Vict. c. 83 (1844), secs. 14 and 15. (The words "and be it enacted that" in these sections repealed,—S.L.R. Act, 1891.)

26 and 27 Vict. c. 87 (1863), secs. 48 and 49.

39 and 40 Vict. c. 52 (1876). (Certain minor repeals,—S.L.R. Act, 1894.)

Melrose *v.* Trustees for Edinburgh Savings Bank [1897], 24 R. 483.

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32 and 33 Vict. c. 73 (1869), secs. 10 and 12.

41 and 42 Vict. c. 76 (1878), secs. 5, 6, and 13.

Wandsworth District Local Board *v.* Postmaster-General [1884], 4 R. & C.T. Ca. 301.

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Defence Act, 1860, sec. 29 (23 and 24 Vict. c. 112).
Ranges Act, 1891, sec. 11 (54 and 55 Vict. c. 54).
Military Lands Act, 1892, sec. 30 (55 and 56 Vict. c. 43).

WATERWORKS.

Clauses Act, 1847, secs. 6 and 25 (10 and 11 Vict. c. 17).

APPENDIX.

EXCERPTS from NOTE, dated 30th June 1897, issued by Mr. ANDREW JAMESON, Q.C., Oversman in an Arbitration between LORD LAMINGTON and the AIRDRIE AND COATBRIDGE WATER COMPANY (see page 90).

In this arbitration the claimant claims to be compensated on the footing that the land taken by the respondents is to be valued not as pastoral land but as land having a special value as the site of a reservoir, and having, therefore, what has been termed, somewhat loosely, as it appears to me, a "commercial value." Alternatively the claimant supports his claim by evidence of the value of the land viewed as part of a pastoral farm, which is its present use. A good deal has been said in the course of the proceedings about a difference of principle in valuation between the witnesses for the claimant and those for the respondent; but it appears to me that the difference between the parties is perhaps one regarding the methods rather than the principles of land valuation. I hope I may be pardoned adverting at this time of day to some elementary principles of valuation regarding which, apparently, there is no difference of opinion between the parties. In the first place, it is well settled that in valuing land taken under compulsory powers the arbiters or oversman are bound to take into consideration not only the present value of the land to the owner, but also any potential or prospective value that it may possess. In ascertaining what potential or prospective value any piece of land possesses, the first question is—what are the uses to which it can be adapted? And the next is, what are the probabilities or possibilities of its being wanted for these uses by the owner himself or by members of the public (including companies and corporations) other than the persons in whose favour the Legislature has granted compulsory powers? It is the first of these questions that has given rise to the term "adaptability." And "adaptability," as is laid down in the case of Countess Mary Ossalinsky *v.* The City of Manchester, reported in the Appendix to Browne and Allan on Compensation, is an element that ought to be taken into consideration in fixing the value of land. But it is obvious that "adaptability" of land for any purpose, though it ought to

be taken into consideration, cannot justly be held to add to the marketable value of land to the owner unless it can be shown that at the time of the land being taken there was a probability, greater or less, of the land being required for that purpose by some person other than the purchaser holding compulsory powers. It is this probability that raises "adaptability" into "marketable value," and in my opinion "adaptability" for any purpose, though it may be considered, can have no value put on it unless by reason of such "adaptability" a probable demand for the land possessing the adaptability is proved. To illustrate what I mean, take the most familiar example of prospective value—namely, the prospective value of agricultural land for building purposes—it may be said that, so far as intrinsic qualities are concerned, most of the land in the country is "adaptable" for being built upon, yet, unless by reason of proximity to a town or the establishment of a new industry in the neighbourhood, or some such cause, there is a probability of any particular piece of land being required for building purposes within a moderate period of time, no value will be put upon the land merely because it is adaptable for being built upon; while, again, if there is a probability of its being required for building purposes, but not till after the expiry of some years, then, if a building value is given, it will be discounted according to the number of years which will probably elapse before the land is wanted for building. Again, taking reservoir sites, I have no doubt that throughout Scotland, and especially in the Highlands, railways have intersected and spoiled what might have been admirable sites for reservoirs, but it never entered the mind of any proprietor or his advisers to make a claim in respect of such land on the footing of its being land adaptable for reservoirs, for the obvious reason that there was no demand whatever for it as such. It has always been the practice in Scotland in arbitrations under the Lands Clauses Acts to consider what uses land is adaptable for. . . . But in no arbitration in Scotland, so far as I know, has value been given for bare "adaptability," apart from a probable demand for the land for the purpose to which it is said to be adapted, such demand being either inferred from surrounding circumstances, other than the circumstance of a party coming to take under compulsory powers, or proved by direct evidence. It seems that it is otherwise in England, and the valuations put on the site in question in this case by all of the claimant's English witnesses seem to be based on these two grounds:—(1) That the land now in question is adaptable for being used as the site of a reservoir; (2) that £150 per acre is a value willingly given for reservoir sites in England, and represents what a reservoir site is worth between parties purchasing and selling the same. Then it seems to be assumed from the fact of the

respondents having come to this site, that either Lord Lamington himself would have utilised it as a reservoir, or the promoters of some other similar scheme would have come to take it. . . .

But, judging generally from the evidence of the claimant's English witnesses in this case, who are gentlemen of high character and of great experience in compensation cases, it would appear that a practice has grown up among arbiters in England of invariably giving high rates for reservoir sites, apart from the question whether in any particular case there was any probable future demand for the site other than the demand from the parties taking it under compulsory powers. This practice may have arisen from the circumstance that there is comparatively little ground in England at high elevations and suitable for reservoir sites in proportion to the extent of the rest of the country and the density of the population residing therein, with the result that all land in England at a certain elevation above the sea level and adaptable for reservoir purposes is assumed to possess a recognised marketable value in respect of the qualities which it undoubtedly possesses. If this is so, I can only say that a different state of circumstances exists in Scotland, where even in what are called the Lowlands there is hardly a single town or village which is not within reach of high-lying ground, where reservoir sites may be readily obtained. But I venture to think that even in England the practice, if it exists, is an unfortunate one, and we have heard in the present proceedings of a case which, I think, shows the danger of determining any particular case by rules of fixed values spoken of by witnesses from their experience in other and possibly different cases. The case I refer to is the case of the Swansea Waterworks. . . . In that case a syndicate had purchased at public auction a sheep farm with hill-top pastures on the ridge between Brecon and Swansea, for the sum of £11,500. The extent of the farm was 5000 acres. A year and a half after the purchase the Corporation of Swansea, having obtained compulsory powers to make a reservoir on said farm, gave notice to treat and the case went to arbitration, when a sum of £12,370 was awarded for 140 acres, which was taken by the Corporation for their reservoir, plus an easement through a tunnel in a hill for their conduit. In that case the owners of the land could not point to any other community which was likely to want that reservoir site of 140 acres. . . . This case is certainly a remarkable one. The price which the estate fetched by public auction a year and a half before the arbitration shows clearly that the land possessed no market value by reason of its adaptability as a reservoir site. It further appears that it could not be proved that there was any probable demand for it as such except by the persons to whom the Legislature had granted compulsory power to take it, and yet an arbiter awarded £12,370 for 140 acres

out of an estate of 5000 acres, which a year and a half before had only fetched £11,500. In other words—putting aside the easement—land which had sold one year at £2 : 8s. per acre, was within two years held to possess the value of £88 : 7s. per acre or thereby. In my humble opinion, and with all deference to the superior experience of valuators who support the practice, I cannot help thinking that the public of Swansea were subjected to a most extortionate charge, and that the practice which leads to such a result cannot be a sound one. . . . I must say that it appears to me that this method of valuation is faulty in principle. It professes to fix the value of the land to the owner by considering how much profit the purchaser will make out of it, and then giving the owner a share of that profit. I am aware that this is attempted to be justified by assuming that if the particular company or corporation taking the "adaptable" land had not done so, some other company or corporation would have done so, and that there being thus a demand for the land for a particular purpose its value is represented by whatever sum the hypothetical company or corporation could afford to pay for it, and might have offered to the landowner for it, and this sum again has to be arrived at by considering what profits the hypothetical undertaking would produce. This is what has been termed "commercial value." I must say this seems to those accustomed to the Scottish practice a strange method of land valuation. It proceeds on the footing of holding adaptability proved, as it generally is, by the fact of promoters of an undertaking armed with compulsory powers applying for the land, and by then assuming hypothetical purchasers as competitors. . . . It was said in the course of the present proceedings that the Legislature has practically sanctioned these methods of valuation because attempts have been made to get clauses inserted in special Acts regarding railways in England, limiting the arbiters or umpire in their valuation to the actual agricultural value of the land, and that Parliament had always refused to insert such clauses. I do not think this proves anything, because I take it that Parliament would never consent in a matter of what must be called general law to alter the provisions of Acts such as the Lands Clauses Act by contradictory provisions in special Acts. But I am not surprised that, looking to the practices and methods I have referred to, there should, as one sees in the newspapers, be occasional remonstrances in England regarding the enormous sums given in compensation cases as compared with the actual value of the land taken, and I would not be surprised if, following the example set in the Allotments Acts, some legislation were by-and-by to be introduced defining more particularly the general law on the subject of compensation for land taken for public purposes as that law is laid down in the Lands Clauses Acts. . . .

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